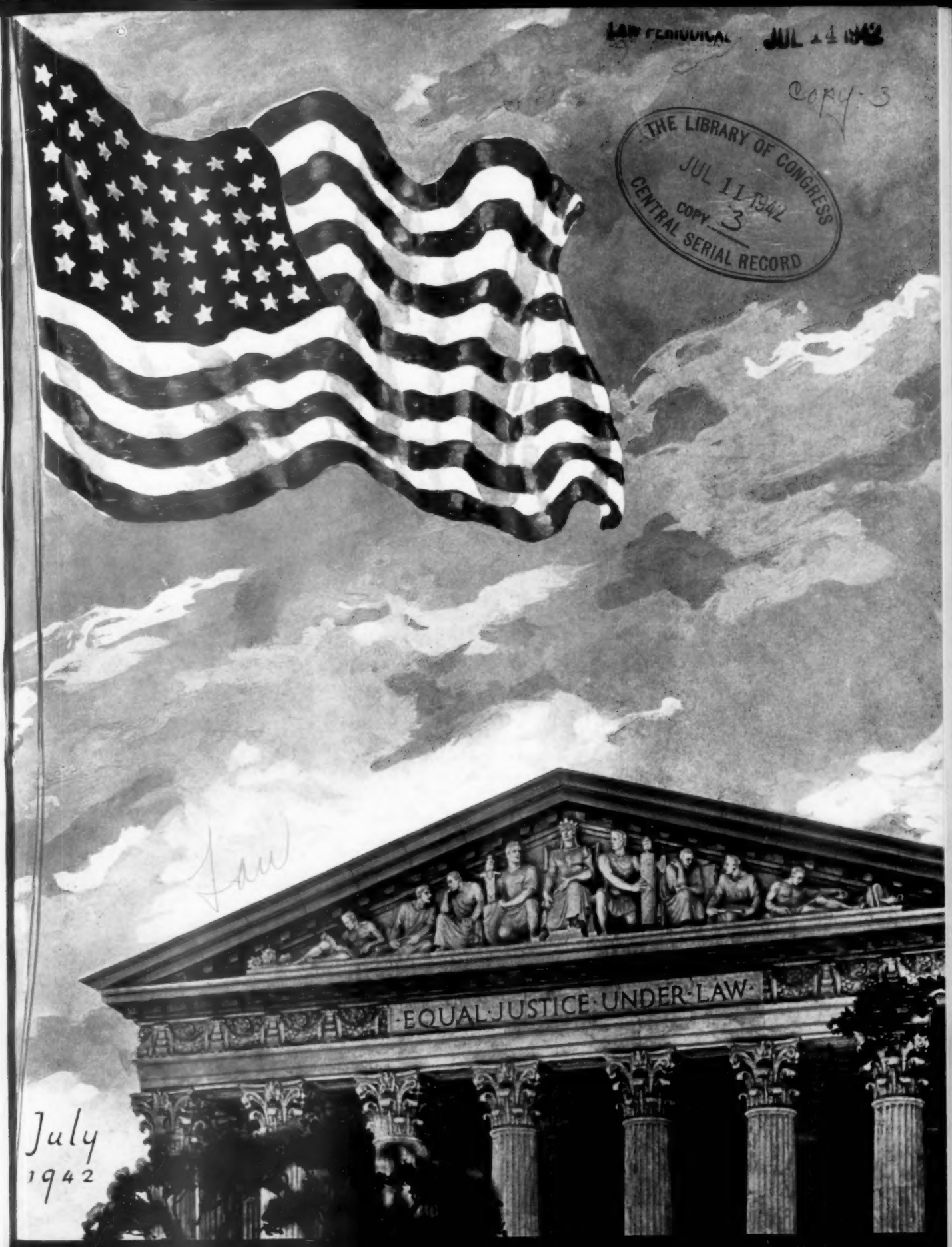

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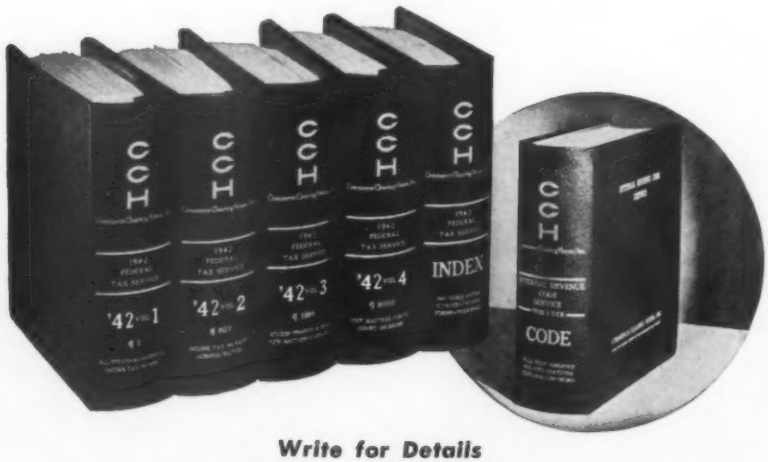

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IN THIS ISSUE

Our Cover—Probably the great majority of July magazines published in this country, will display on the front cover the American flag in colors. The suggestion so to do has met with almost unanimous approval. The JOURNAL of the American Bar Association could not possibly be in default on such a movement.

And so we lift the glorious Flag of Freedom above the pediment of the marble Temple of Justice and the inscription "Equal Justice Under Law" in witness of our devotion to the cause of Liberty.

The Lawyer in Wartime—This month we lead with Associate Justice Byrnes' address, delivered at the annual dinner of the Illinois State Bar Association, June 4, 1942. The thoughts expressed are those derived from a long experience in public life as a distinguished lawyer, Senator of the United States, student of contemporaneous history, observing traveler, and Associate Justice of the Supreme Court of the United States.

Impact of the War upon the United States Courts—Henry Porter Chandler, Director of the Administrative Office of the United States Courts, contributes an article entitled as above. In this article will be found reference to the important statutes which outline the controlling public policy of the nation. Among those acts, special reference is made to some which place a burden and responsibility on the federal courts and which show the extent to which courts and lawyers participate in the administration of justice in time of war and under war conditions.

Mechanics of Appellate Decision—Iowa—Improvement of the administration of justice through better appellate procedure is now receiving increased attention. Mr. Justice Miller of the Supreme Court of Iowa writes on procedure in Iowa.

Ross Essay Competition—The far-sighted liberality of the late Judge Erskine M. Ross of California, brings to the JOURNAL the privilege of publishing another of the excellent essays submitted in the 1942 competition. The author, Albert Smith Faught, of the Philadelphia bar, discusses labor relations law.

The Van Devanter Memorial—Chief Justice Stone delivered a notable address which dealt not only with the life and judicial activities of Mr. Justice Van Devanter from the viewpoint of one closely associated with that work, but one which brings a message to the bench and bar which should be accorded close attention.

IF YOUR JOURNAL IS LATE

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Wartime conditions make production of the Journal more difficult. Transportation has been curtailed which slows up the receipt of copy and the distribution of the finished book. We try to get the Journal to you on the first day of the month but if it is late please realize it is because of conditions beyond our control.

Review of Supreme Court Decisions—In this department are presented the views of 14 decisions of unusual importance and interest.

Religious Liberty—The organization known as "Jehovah's Witnesses" again has engaged the attention of the Supreme Court. Its members came in conflict with local municipal ordinances in Alabama, Arkansas and Arizona. Claiming immunity from the payment of license fees on the ground that the books and pamphlets sold were religious in character, brought them in conflict with the exercise of municipal authority justified by the necessity of preserving order and decorum on the public streets. In addition to two dissenting opinions, there was a brief statement by three of the justices, who had voted with the majority in the *Gobitis* case, announcing that they no longer held the views expressed in that celebrated case.

Administrative Law—A controversy between the Federal Communications Commission and the broadcasting systems involving very large interests and touching every person who gets his news through the various networks, was brought to the Supreme Court for decision, but the main issues were not reached. A single interesting point of procedure monopolized the attention of the Court and required the cases to be remanded for further consideration. The holding is that a regulation of the Federal Communications Commission prescribing the method to be employed in the conduct of broadcasting systems is in effect a final order because of its automatic effect without further action.

Two cases which involved the Fair Labor Standards Act dealt with the problem of applying a statute which dealt explicitly with minimum hours and wages where the employment was by the hour, and two cases in which the employment contract was for indeterminate hours.

In the *Kirschbaum* case, the Fair Labor Standards Act was interpreted as applicable to employees engaged in the operation and maintenance of a building in which goods for interstate commerce are produced for distribution in interstate commerce.

Patent Law—In the shoe machinery case, the Supreme Court affirmed a judgment of the Circuit Court of Appeals which reversed the decision of the District Court and which is declared to be the first instance in several years in which the Supreme Court held a patent to be both valid and infringed.

CURRENT EVENTS

Basic Changes in Patent System Proposed to Congress

A SERIES of bills which, if they become law, will basically change the patent system, has been introduced in both houses of Congress during the past three months. This legislation proposes among other things the compulsory licensing of patents, prohibitions against restrictive patent licenses and stringent limitation of rights previously recognized as inherent in the inventor or granted to him by statute.

Senate Bill 2303, introduced in the Senate February 23, 1942, is a "war" measure proposed to grant to the President the right to issue licenses upon incontestable compensation under any patent in the public interest. The term of the license would not be limited to the war or period of war effort, but would be determined by the executive authority. In addition, the President is empowered under the bill to seize the patent outright. The bill also includes a tacit restatement of the Act of 1918 (Sec. 4918 R. S.)

Senate Bill 2491, introduced in May of this year, is in the nature of "permanent" legislation in contrast with the emergency character of S. 2303. In addition to providing for compulsory licensing of all patents upon application to the Commissioner of Patents and upon terms to be fixed by the Commissioner, it prohibits restriction of licenses generally upon such terms as territory, use, quantity and price. Patent suits against other than the primary infringer—manufacturer—would be prevented until the patent was first sustained against the manufacturer. Other similarly drastic provisions and penalties are included.

A number of House Bills less revolutionary in basic concept have been introduced in the House, including H. R. 6852, H. R. 6828 and H. R. 6878. These are all "war" measures and are designed to add to the rights of the government to use all inventions in the public interest as prescribed in the Act of 1918.

The Association through the Board of Governors has disapproved in principle S. 2303 and approved in principle H. R. 6852, thus endorsing the action of the Section of Patent, Trade-Mark and Copyright Law. The Section, through its appropriate committees, is vigorously following the course of this legislation.

Tire and Gasoline Rationing

IN response to the suggestion of many members of the profession, the Association's Committee on Coordination and Direction of War Effort has undertaken a survey of the effect which the rationing of tires and gasoline may have upon the administration of justice. Many lawyers have come so to depend upon the automobile in the prosecution of a practice over broad areas where other transportation is inadequate or even absent, that curtailment of that means of transportation threatens not only their livelihood but their capacity to perform the function for which the community licenses them. The same rationing is reported to have a potential effect upon circuit-riding judges engaged in the administration of civil procedures.

The first step in this survey is to ascertain what the facts are. To this end the Association's Committee intends to ask state and local bar associations to assemble data requested on questionnaires. The second step will be the collation of the material so obtained and its presentation to the Office of Price Administration, with a view to securing for the bar and the bench an adequate weighing of their requirements, in balance with the needs of other groups in the community.

Members of the Association who are interested in the problems of tire and gasoline rationing as applied to the profession, may address the American Bar Association, Committee on Coordination and Direction of War Effort, Hill Building, Washington, D. C.

West Point Cadet Receives Section Award

AT the Annual Meeting in Philadelphia in 1940, upon recommendation of the Section of International and Comparative Law, a resolution was adopted providing for a prize to be awarded annually to the cadet of each year's graduating class standing highest in his law studies at the United States Military Academy at West Point to be presented as an evidence of the Association's desire to place its stamp of approval on his special interest in the law.

The first award was made in 1941 to Cadet Curtis Wheaton Chapman, Jr., of Detroit, and consisted of the two-volume work by Charles Warren on *The History of the Supreme Court of the United States,* and a deluxe edition of Wigmore's *Panamora of the World's Legal Systems,* in three volumes.

The books constituting the prize for 1942 are identical with those awarded a year ago and were presented to Cadet James Bryan Newman, 3d, who achieved his first place in law by receiving a total of 138.45 out of a possible total of 150 proportional parts for the year's work.

Cadet Newman is the son of Colonel James Bryan Newman, Jr., of the Corps of Engineers, who was graduated from the United States Military Academy in 1918. Cadet Newman is following in his father's footsteps, having been commissioned upon graduation in the Corps of Engineers. He had a high standing in many other sub-

James Bryan Newman, 3rd

jects besides law while at the Academy and graduated number ten in his class in the order of general merit. While standing so high academically he was also an athlete, having been on the track team for two years.

New Publication on Municipal Law

LAUNCHED last March by the Section of Municipal Law of the American Bar Association, the *Municipal Law Survey* and the new *American Municipal Law Review* have been enthusiastically received by municipal law officers, lawyers particularly interested in municipal law and administration, and civilian defense officials.

The *Municipal Law Survey*, which is issued monthly in loose-leaf form, is an authentic up-to-the-minute digest of case law, legislation, administrative regulations and legal literature. The section dealing with The War Emergency and Local Government is a "must" for everyone concerned with this rapidly expanding field of governmental activity.

The *American Municipal Law Review*, which is issued quarterly, contains original articles, Notes and Comments, Section Activities and Reports, as well as material originally published in the *Survey*. The April issue contains more than 100 information-packed pages.

President Armstrong Receives Honorary Degree

BOSTON UNIVERSITY conferred the honorary degree of LL. D. on Walter P. Armstrong, President of the American Bar Association, May 25, 1942.

Investigators Sought for Federal Agencies

INVESTIGATORS to perform investigative work for Federal agencies are being sought through an announcement released by the United States Civil Service Commission. The salary is $2,600 a year. It is expected that positions will be filled in Washington, D. C., and throughout the United States. Appointees will probably be in a travel status for the greater part of the time. The work will be of a confidential character, in which the investigator must meet and confer with individuals in all walks of life. The data developed must be assembled in written reports.

Experience is required either in making investigations in connection with the prosecution of civil or criminal cases, in the general practice of law which included court presentation or investigation in preparing cases for trial, or in responsible positions which required the exercise of tact and independent judgment in meeting and dealing with the public. Education completed in an accredited college may be substituted for a part of the experience. Persons with legal education and appropriate experience are particularly desired.

Applicants must be at least 25 and not over 55 years. A written test will be given to competitors to determine their aptitude for learning and adjusting to the duties in the service. The appointments will be for the duration of the war and for no longer than 6 months thereafter. Applications must be filed with the Civil Service Commission, Washington, D. C., and will be accepted until the needs of the service have been met.

The forms for applying may be obtained from the Commission's representatives at first- and second-class post offices, or direct from its Washington office.

Lawyers and Realtors Settle Long-Standing Controversy

FOR a great number of years, there has been much honest misunderstanding and unhappy controversy between the real estate boards and bar associations and realtors and lawyers in different parts of the country. Both serve the public and it is highly in the public interest that they understand one another and cooperate in that service. The Committee on Unauthorized Practice of the Law has consistently maintained the position that the public is entitled to competent and disinterested legal advice in real estate matters, and is likewise entitled to expert real estate service by skilled and experienced brokers.

Following out the policy of the Committee on Unauthorized Practice of the Law, which had been approved by the House of Delegates

> "of endeavoring through full discussion of unauthorized practice problems to secure wherever possible the cooperation of national associations of laymen in the acceptance of principles relating thereto" (65 A.B.A. Rep. 406)

the Committee has been seeking to solve this problem by agreement and understanding.

On May 5, 1942 at Memphis, Tennessee, after an all-day session between the Committee and Mr. David B. Simpson, President, Mr. Herbert U. Nelson, Executive Vice President,

(Continued on page 514)

THE LAWYER IN WARTIME*

By The Honorable JAMES F. BYRNES

Associate Justice, Supreme Court of the United States

ABOVE the columns of the Supreme Court building, carved in marble, are the words "Equal Justice Under Law." Through the centuries these words have been engraved in the minds and hearts of men and women struggling against oppression. They embody the aspirations we have cherished from the Sermon on the Mount through Magna Charta to the Four Freedoms. No lawless force can ever erase them. The effort to erase them and to substitute government by dictatorship for government by the people has set the world at war.

All nations are involved. There is no such thing as neutrality. A nation or an individual is either for us or against us. And there is no room for compromise. We cannot compromise with nations dominated by rulers who respect no obligation, and who use conferences for compromise only as a cloak for stealthy attack.

For such a war we were entirely unprepared. We are a peace-loving people. After the suffering of the last war, we did not believe that any nation would again make war. Absorbed in our efforts to improve the welfare of our people, we failed to appreciate the significance of the preparation for war by the Axis powers. In this we were not alone.

In 1937 I was in Europe. In France I found a bitter conflict between capital and labor. Neither side would make concessions. They were so busy fighting each other that they made no preparations to defend themselves against Hitler. Today industrialist and laborer are working long hours for no pay—and they are working for Germany, not France.

An overnight trip took me to Germany. I attended the Nazi Party Congress at Nuremburg. I saw there the greatest military display I have ever witnessed. In Berlin, in September 1937, I witnessed the first blackout. No nation threatened but they rehearsed. From Munich to Bremen, Germany was an armed camp. Soldiers marched everywhere, singing always "Germany Over All." I talked with government officials, laborers and farmers. They talked only of war; the officials with confidence, the citizens with fear—but with faith in der Fuehrer.

The day of my arrival in England I witnessed a peace parade. There were several thousand marching. They carried banners "Peace on Earth" and "We Did Not Raise our Boys for Cannon Fodder." While the British prayed earnestly, the Nazis prepared feverishly. Those Britons were precisely like the God-fearing, peace-loving people of America. Because they wanted to make war on no nation, they could not believe Hitler would make war on them.

By her unpreparedness France was destroyed. That England was saved is miraculous. Had it not been for the courageous spirit of the British people and for Hitler's attack upon Russia, I hesitate to think of our fate. There is this consolation. Our failure to prepare in advance, contributes now to the unity which is our greatest strength. By the decree of no ruler could there be awakened in the people of America the will to make war. That will rests solely upon conviction in the righteousness of our cause. Today as the people recall our Neutrality Legislation, our efforts to bring about peace, our delay in defense efforts for fear that they might provoke war, they know that we were without fault, that for us there was no escape. They know, too, that the treacherous attack of the Japanese at Pearl Harbor destroyed our ships but created a unity that in turn will destroy Hitler, Tojo and "The Forgotten Man" of Italy.

You may not be able to enlist in the armed forces. That is the privilege and the duty of the young. But you have an opportunity to serve. You are a soldier on the Home Front. It is your duty to subordinate everything else in life to the task of seeing that, while our young men fight abroad, they are not betrayed at home either by the thoughtless or the vicious.

With your prestige, you can lead people. With your training, you can analyze facts. You will not be misled by the headline which makes the winning of a skirmish look like the winning of a war. You will know when the enemy is seeking soft spots in your psychological armor. And when the olive branch is offered in hands bloodied by betrayal, you will see it as a symbol of the peace of slavery, the peace of the concentration camp, the peace of the graveyard.

You will not permit us either to underestimate or overestimate ourselves or our enemies. You will be unmoved by the shallow patriotism which fastens itself to such a phrase as—"America never lost a war." You will warn the people against unwarranted optimism. You will tell the truth, that we face a long war and a sanguinary war.

I wish that our Military Intelligence Service would recite over the radio the statements of American individuals and newspapers that are being used daily by German and Japanese propagandists to give aid and comfort to the enemy. They not only learn quickly what has been said here, but fire it back in its original form

*An address delivered at the Annual Dinner of the Illinois State Bar Association, in Chicago, on June 4, 1942.

or in a poisonous version in order to disaffect segments of our population. It is flashed out in every language in order to discourage our friends in every part of the world.

Only a few days ago the Press carried a story of the Nazi submarine commander who, in refusing aid to men and women in life boats as a result of the sinking of their ship, told them they had only President Roosevelt to blame. It aroused our indignation and yet he was but repeating what has been printed in some newspapers that have not received from the American people the condemnation they deserve. Whenever an American utters or prints a statement that is used successfully by the Axis propagandists to promote the cause of our enemies, he is responsible for prolonging the war and shedding the blood of American boys. Just as we inscribe the names of our heroes on a roll of honor, we should inscribe his name on a roll of infamy.

It is a part of your duty to warn the people of the propaganda methods of the enemy. Today China is all but isolated from us except for air transportation and camel caravan. Because of this, the enemy broadcasts to China that the United States has deserted her. At the same time they broadcast to America that China is about to acquiesce in Japanese rule. For five long years China has fought alone and has suffered as no nation has ever suffered. With a relatively small army, utterly lacking in modern equipment, the Chinese people refused to sacrifice liberty for safety. Their loss of life has been terrific but their spirit will never die. And America will never desert her.

Today our communications with Russia are being maintained under terrific onslaught. The Nazis are concentrating their forces on the convoys bound for Murmansk. Because of our inability to make the deliveries we would like to make, the enemy broadcasts to Russia that we are no longer willing to redeem our pledge of assistance.

In the broadcasts to this country, the Nazis picture to us the sinister designs of the Communists upon the United States. America is attacked by the three most dangerous international highwaymen in the history of the world. If I should be attacked by a highwayman, I would not care about the religion or the politics of the man who diverted my assailant. If we are victorious against the Axis powers, we need not worry about the Communists in our midst.

Without warning, Russia was attacked. The full strength of the greatest military machine in the world was thrown into a blitz which it was confidently expected would in six weeks conquer her as it had conquered so many other countries. But the justice of their cause gave to the Russians the power to resist. Eleven months have passed and during that time Russia has won for herself a glorious page in the annals of military history. The Russians have destroyed the illusion of the invincibility of the German army. They are daily growing stronger and because of them Hitler is daily growing weaker. They were the first to hold his armies; they were the first to make them retreat. Every Nazi soldier that Russia accounts for makes one less for us to account for. And let us be honest! Russia by her magnificent defense has given us the time in which to prepare to save ourselves.

The most persistent effort of the enemies of America is the effort to arouse dissension between Britain and the United States. Over the radio the British are told that America will agree to manufacture weapons of war as long as the British will use them in defense of the United States. In this country, our enemies circulate the wisecrack that England will fight to the last American. They picture the British soldier as lacking courage. They would have us forget that in Malay the Argyll and Southern Islanders went into the jungles to meet the Japanese invaders with 850 officers and men. They came out with one officer and 79 men. The British soldier was unprepared for jungle warfare. But that he is lacking in courage is a cruel slander of a courageous fighting man.

In 1940 British women and children, as well as men, proved their valor. They showed that they knew how to suffer but not how to surrender. London was not like Paris. Paris became an open city. Its buildings were saved. In the future as in the past Americans will go there. They will visit the Louvre. They will marvel at the magnificent churches. But I believe that those who visit London will find greater spiritual refreshment in the ruins of St. Paul's Cathedral and the damaged walls of Westminster Abbey than in the unscarred buildings of Paris.

To the British Isles and the Irish Free State the Nazis broadcast that prominent Irishmen in the United States are demanding peace. Who ever heard of a real Irishman demanding peace? But, because in the years past the British have made a terrible failure of the Irish question, these German propagandists think they can cause disaffection among the Irish in the Irish Free State and in the United States. Throughout American history it has been proved.

In the first week of this war a young aviator, knowing that he flew into the jaws of death, drove his plane almost to the deck of a Japanese warship destroying it and losing his life. To honor his memory the first Congressional Medal was awarded to Colin Kelly.

A mosquito boat stole into Subic Bay, sank a Japanese warship and safely returned to base with its Irish hero, John Duncan Bulkley.

As long as the deeds of brave men bring cheer to the heart, the story of the defense of Wake Island by the Marines will be told and there will be remembered the name of the Irish Commander, John Patrick Devereaux. O'Hare, O'Donnell and countless others are showering glory upon their race and this country. As the blood of the race of Kelly, Burke and Shea is shed for us, it gives the lie to their traducers at home and abroad.

You, my fellow-lawyers, possess the ability and training to be the shock-troops against this kind of warfare. You will realize better than others that in the performance of that duty a solemn obligation rests upon you to see that the loyal in your midst are not subjected to persecution. As casualty lists increase, passions will be aroused. Suspicions will grow. In nearly every community there are citizens of German blood and citizens of Italian blood, whose loyalty cannot be questioned. When the flames of passion and prejudice threaten to envelop them, it will be your duty to protect them. Only in this way can we prove ourselves worthy of the unity we desire and require to succeed. We must by all means avoid developing among ourselves a Hitler-like contempt for other groups and creeds and races. We want no Hitler justice here. We want no trial by ax-men instead of by juries. We know the meaning of Equal Justice Under Law. We know the blessings of Liberty. To preserve these, we will give our all, God helping us, we can do no other.

AN OPPORTUNITY FOR THE NATIONAL PATENTS PLANNING COMMISSION

By NORMAN N. HOLLAND*

Of the New York Bar

IN the creation of new laws, a commission is at its best when dealing with highly specialized rules of conduct with which the general practitioner and the average legislator is least familiar. In 1934, a commission, of which William D. Mitchell was chairman, was appointed to rewrite the rules of practice for the federal courts. Its recommendations were adopted substantially *in toto*. The opposition of the Bar at that time in agreeing to the changes from the known to the unknown was formidable. Today only a few would consider going back to the old rules. Such periodic, systematic and forward looking revisions are preferable to piece-meal changes at the instigation of ill informed public clamor.

President Creates National Patents Planning Commission

The National Patents Planning Commission, appointed by the President by executive order No. 8977, has a similar opportunity of rendering the public an invaluable service by delving into the patent laws and by submitting an unbiased report which will serve as a foundation for the removal of objectionable features and develop an equally solid foundation for the retention of all basically good features of the present laws. The Commission is composed of Charles F. Kettering, Chairman, Owen D. Young, Chester C. Davis, Edward F. McGrady and Francis P. Gaines. The Commission is empowered to appoint "such officers, committees and sub-committees as it may deem necessary to carry out its function," namely to conduct a comprehensive survey of the American patent system. The integrity of the members of the committee is above reproach. Mr. Kettering has directed for a number of years the development work in the General Motors Corporation and is particularly qualified in the field of inventions and their development.

Long Range Investigation of Patent System in War Time Undesirable

For several years, the patent and anti-trust laws have been undergoing an extended investigation by Congressional committees; for example in 1938 and 1939, by the Temporary National Economic Committee under the direction of Senator Joseph C. O'Mahoney and more recently by the Senate Committee on Patents, under the direction of Senator Homer T. Bone. The latter investigation is being made subsequent to the appointment by the President of the present National Patents Planning Commission. In the heat of argument before the press, there is crimination and recrimination. The Department of Justice claims that the patent laws are being misused; changes are demanded. Others claim with equal vehemence that the changes sought by the Department of Justice will do more harm than good. The desire for publicity and spectacular statements to obtain it are frequently obvious to the initiated but confusing to the uninitiated. The atmosphere is not conducive to unbiased deliberation and unwise laws may result. The clamor of the public after Pearl Harbor would undoubtedly have led to unfortunate decisions. The so-called Roberts Fact-Finding Commission, composed of competent men who knew their business, calmed the public. The resulting investigation and report were painstaking and thorough, from an unbiased source which had no ax to grind and no votes to lose.

The United States leads the world in industrial progress; particularly in this respect it is envied by all nations. The country is filled with gadgets, domestic and industrial, for simplifying and alleviating the task of

*Mr. Holland prepared this article as a part of the work of the Committee on Corrective Publicity of the Section of Patent, Trade-Mark and Copyright Law.

the worker and the housewife and for raising living standards. Only yesterday, the vacuum cleaner, electric iron, radio and mechanical refrigerator were unknown. Tomorrow may bring the housewife the long awaited practical dishwasher and other advances not yet dreamed of. Geographical frontiers may be behind us, but scientific frontiers are vast and ever receding. Every effort should be made to tap to the limit our uncharted scientific wealth. While there are differences of opinion as to how much credit for our industrial progress is due to our patent system, all agree that the system has played an important role in the rapid advance. All are agreed that the country needs not less, but more of that which has enabled us to outstrip other nations industrially. The National Patents Planning Commission may find ways of making the patent laws even more effective in our future economy.

Invention a Property Added to Public Domain

The factual basis for the granting of a patent is that an inventor produces something that the world does not have and except for his genius, would not have until a later date, if at all. If the inventor so desires, he may keep his invention secret and prevent the public from ever having the benefit of it. If one finds a watch, his title is good against everyone except the owner. An inventor discovers something which no one ever had, in fact, did not even exist. The present laws give him the exclusive right to it for a period of seventeen years. Now seventeen years seems a long time looking forward in a man's life, but it is only a slight pause in the life of a nation. Would anyone begrudge Watt the exclusive rights to his steam engine from 1769 to 1786 in return for the value the public has derived from it without cost during the century and a half since that time? Does anyone begrudge Edison's exclusive right to the incandescent lamp from 1880 to 1897; Howe's exclusive right to the sewing machine from 1846 to 1863; Mergenthaler's exclusive right to the linotype machine from 1890 to 1907; or Goodyear's exclusive right to vulcanized rubber from 1860 to 1877?

Patent Protection Inducement to Assumption of Investment Risks

Apart from rewarding an inventor for the discovery of a new machine or process, the public has much to gain from the establishment of new industries which are dependent as much on the reward for their existence as they are dependent upon the invention itself. In the hearings of the Temporary National Economic Committee of 1938, it was brought out that an individual was frequently ready to build machinery and market a product not then on the market. However, when he found on investigation that patent protection could not be obtained, he dropped the whole project. Lawyers are generally familiar with such instances. The reason is simple; one cannot spend the money for machinery required to produce an article and the additional money required to create a demand for it unless there is reasonable assurance of his being able to profit from the investment. A patent gives this assurance. If others can enter the field after the headaches are over and after success is assured without incurring development expenses, their investments and risks are less and they can undersell the one who pioneers the advance. No one would look for a gold mine and after finding it open it up to the public unless he were permitted to claim and work a portion of it exclusively or be paid for its use by some third party. The National Patents Planning Commission should consider whether or not the public at large would be benefited by granting protection for the introduction of new articles which are not patentable and the ways and means of accomplishing the result. The present patent laws are not applicable unless the subject matter of a new article or a new machine is an invention.

Invention Is First Big Step of a Long Program of Commercialization

The completion of an invention is only the beginning of an inventor's work. When Edison discovered the incandescent lamp, there was no power station for current. He had to devise his own electric generators for producing current and to build the Pearl Street power station in New York. The invention of the Morse telegraph was useless without telegraph lines between cities. In order to realize on an invention, one must either venture the money required to place it on the market or induce someone else to do so. Generally a substantial part of the seventeen year period granted by a patent is consumed in getting started. In many cases, another inventor produces something better which supersedes the first invention and the later inventor thereby reaps the reward. Radio supplanted the victrola; the automobile superseded the horse and buggy; the incandescent lamp antiquated to a large extent oil and gas lamps; and so on *ad infinitum*. No one knows the hazards between the completion of an invention and its commercial success better than Charles Kettering, Chairman of the National Patents Planning Commission.

In a democracy, the rights of the few have to be subordinated to the welfare of the many. But the welfare of the many would soon become static if the rights of the few were to go unrespected. Inventors number a small part of our population, but an important part. Our continued industrial growth depends in a large measure upon inventive genius and upon the continuance of laboratories in which they may work and invent, and to an even greater extent upon the reward bestowed for success in inventing and for success in commercializing inventions. Labor thus finds an outlet for improving its welfare. For a century and a half, this reward has been given by granting patents. Individuals and companies have envied those enjoying the hard earned rewards of our patent system and have frequently tried unlawfully to share in them, but the public generally

has not felt any hardship. Economic laws apply to patented articles. The higher the price is, the lower the volume. A patent owner, if he does not already know, soon learns that the greatest profit is in a large volume at a low cost. In many cases, for example, synthetic rubber, there are competitive products which limit the price. Both of these factors prevent the inventor from asking exorbitant prices for his product.

Reward for Invention Essential Stimulus to Continuing Industrial Progress

Our industrial development has been so well performed in the past and we are at such a high pitch at the present that it will probably go on for a limited period without substantial inducement in the way of rewards. Eventually, without a proper stimulus, it will slow down and finally stop. Rewards are as essential to the continued growth of an industrial system as gasoline is for the operation of a car.

Inventors in the past have periodically delivered to the national economy a series of golden eggs for a relatively small consideration. It would be unfortunate if, in a sudden outburst of feeling, arising out of a few isolated instances involving the improper application of the patent laws, the whole system should be condemned and the advance retarded. The National Patents Planning Commission has the delicate task of protecting the public welfare by not paying too much for the assurance of industrial progress and by not paying too little. If there is an error in either direction, the public loses. If the reward is too great, the public obtains inventions at a cost greater than it has to pay. If the reward is too little, the public may fail to get many inventions which a proper reward would stimulate and thus it would suffer an irreparable loss. Our country is fortunate in having an unbiased, able commission to ascertain the facts and to strike a true balance. The Commission might do well to follow the maxim that a person gets what he pays for. The public has everything to gain by liberality and much to lose by a short-sighted, long-range policy. It is fortunate also that the patent system will be considered by a commission removed as far as possible from partisan politics and from minority pressure groups. The wholehearted cooperation of lawyers and particularly patent lawyers should be helpful in correcting the imperfections in our patent laws without impairing their desirable features.

This is the day of specialists in laws as well as in jobs. There are few places for the "jack of all trades and the master of none." The National Patents Planning Commission is an able body with the power to appoint experts in the patent field and to make findings of fact and recommend remedies based on facts found. With this solid foundation, the Congress will be able to make wise patent laws which will serve to stimulate further industrial growth in the greatest of all industrial countries.

AMERICAN BAR ASSOCIATION ENDOWMENT

THE first annual meeting of the members of the American Bar Association Endowment will be held at Detroit, Michigan, on August 26, 1942, at 10:00 A.M. There will be an election of two Directors of the Endowment and the transaction of such other business as may need to come before the meeting.

At the Indianapolis meeting of the House of Delegates the report of the Committee on Ways and Means, resulting from several years' study of the Endowment, was approved. The new Committee on Ways and Means was instructed to proceed with the incorporation of the Endowment as a corporation not for profit, to which gifts or bequests might be made by persons wishing to provide for the permanent financing of the Association or some particular project of the Association. The House named as Directors the following:

For the one-year term: R. ALLAN STEPHENS, of Illinois
For the two-year term: GEORGE L. BUIST, of So. Carolina
For the three-year term: THOMAS J. GUTHRIE, of Iowa
For the four-year term: CARL B. RIX, of Wisconsin
For the five-year term: JACOB M. LASHLY, of Missouri

Mr. Buist subsequently resigned, and the two Directors to be elected at Detroit will therefore be chosen to succeed Mr. Buist and Mr. Stephens. The Director to be elected to succeed Mr. Stephens will serve for the regular five-year term.

On February 13, 1942, the certificate of organization of the American Bar Association Endowment was issued by the Secretary of State of Illinois. A meeting of the first Board of Directors was held in Chicago on March 2, 1942. Among other business transacted at that meeting the following officers of the Endowment were elected to serve until the next meeting of the members or until their successors are elected and qualified:

President: JACOB M. LASHLY
Vice President: R. ALLAN STEPHENS
Secretary: HOWARD L. BARKDULL
Treasurer: THOMAS J. GUTHRIE

All members of the Association are members of the corporation, and their interest in its affairs is invited and urgently requested. This is the first time in the history of the Association when a vehicle has been available by which the Association could accept such gifts. It is hoped that lawyers in making donations during their lifetime or by will, or in advising their clients as to wills and trust agreements, will bear in mind the existence of the Endowment as a worthy means through which funds may be used for the advancement of the profession. Bequests by will to the Endowment are exempt from the federal estate tax, and gifts during the lifetime of the donors are available as income tax deductions.

ASSOCIATE JUSTICE VAN DEVANTER

AN APPRAISAL

By THE CHIEF JUSTICE*

IT is altogether fitting that the Bar and this Court, of which Justice Van Devanter was so long a member, should now express and here record their estimate of his character and his eminent services. During most of his active life Justice Van Devanter was a public servant, for whose services there could be no greater reward than recognition that they were well and faithfully performed. Such recognition by his professional brethren is the only reward he would have prized.

No mere catalogue of the events and achievements of his career could give an adequate impression of the man. His distinction was so preeminently that of character and personality, and was so rooted in his conception of the duties and obligations of the judicial office, that we should miss the true significance of his work as a judge if we were to attempt to define it wholly in terms of his public record. But his character and personality were not uninfluenced by environment. All that he experienced in his early days in the West and his later contacts with it did much to shape the pattern of his life. As lawyer, legislator, and judge in Wyoming in its period of transition from territorial government to statehood, and later as Circuit Judge for the Eighth Circuit, exercising his jurisdiction throughout a vast territory extending westward from the Mississippi River to the foothills of the Rockies, he made his own something of the tradition and outlook of the pioneer West.

He saw and was a part of the expansion of free enterprise in the development of the new world lying beyond the Mississippi. It was a period when, more than any other in our history, men were the masters of their fate. They sought the great West to build homes, acquire property, and establish orderly communities. As good citizens they were zealous to put down the lawlessness of the frontier and to establish laws and courts which would insure the safety of persons and property. Beyond that they asked only for that most natural and characteristic of privileges in a thinly settled country—the right to be let alone. Theirs was the philosophy that that government governs best which governs least, a philosophy not without its effect upon Justice Van Devanter's appraisal of the functions of government under the restraints of a written constitution.

As Circuit Judge his opinions in appellate cases speedily won the recognition of Bench and Bar by the range and accuracy of the legal knowledge which they exhibited, the care with which they were prepared and their clarity of statement. His quick perception, his ready command of the rules of evidence, his alert and incisive mind, gave him special facility in the trial of jury cases. The trials over which he presided as Circuit Judge, of which there were many of note, were conducted with exemplary fairness, courtesy, firmness, and dispatch. He never lost his zest for the forensic battleground. His last judicial service, after his retirement from this Court, was to preside over several trials in the District Court in New York. It was a matter of public comment that under his sure and skillful direction they were models for the administration of trial justice.

As Assistant Attorney General assigned to the Interior Department and later as judge in a western circuit, he was most frequently concerned with the infinite variety of questions arising out of the administration of the public-land laws. Never content with superficial knowledge or performance, he devoted himself assiduously to their mastery. He thus gained expert knowledge of mining laws and the law of water rights in the semiarid regions of the West, of the laws and treaties affecting the right of Indians, of the rights of government and individuals arising out of the railroad land grants and other grants of the public lands—all of which continued to occupy the attention of the courts throughout his lifetime. His acquaintance with the history and customs of the Indian tribes, his sympathetic understanding of their inability to cope with the greed and cunning to which they were so often exposed, made him a veritable citadel of justice for this hapless people. Early in his career he had occasion to make special studies in equity jurisprudence and of the procedure and jurisdiction of the federal courts. His knowledge of these indispensable aids to the sound administration of justice was profound.

It was with this background and experience and these special skills that Justice Van Devanter began in 1911 his service as a Justice of this Court, which was to continue for over twenty-six years until his retirement in June 1937. You do well, Mr. Attorney General, to make mention of some of the notable cases in which he wrote opinions for the Court, for they give something of the measure of the man and the lawyer. They remind us that while he brought to this Court the benefits of his special knowledge and experience in particular branches of the law, he was by no means a narrow specialist. They cover a wide range of interests. They evidence the

*Response of The Chief Justice to the resolution presented by Attorney General Biddle, March 16, 1942.

breadth and depth of his knowledge in many fields of the law and reveal the vigor, sanity, and precision of his mind. They exhibit the sense of proportion with which he adapted principles of the law to the special facts and circumstances to which they were to be applied. They are models of judicial exposition, never discursive, redundant, or sprinkled with irrelevant citations. Simple and direct in statement, orderly, lucid, complete; they give a hint, but only a hint, of the painstaking care which in fact he gave to their preparation.

This Court often had occasion to draw on Justice Van Devanter's exceptional knowledge of procedure and judicial administration for purposes other than the decision of cases and the writing of opinions. A notable example was his supervision, as chairman of a committee of the Court, over the receivership growing out of the boundary dispute between Oklahoma and Texas, which occupied the attention of the Court from 1920 to 1925. Another was his participation in the drafting of the Judiciary Act of 1925. To his special familiarity with the organization and appellate practice of the federal courts, to his skill in draftsmanship in preparing the Act, and to his luminous expositions of its provisions, are due in large measure the enactment of that legislation. It gave to the Court freedom to direct its efforts to the performance of its true function as the highest appellate court of a nation-wide judicial system.

Those whose privilege it was to sit with Justice Van Devanter in this Court know well that the public evidences of his judicial activities conceal rather more than they reveal what was his greatest service to the Court and to the public. It was a service inspired by his high conception of the function of a Justice of this Court, and of the part which the Court itself should play in our constitutional system. He was profoundly aware that the true source of the strength of the Court and the permanency of its influence is public confidence in the thoroughness, integrity, and disinterestedness with which it does its work. In his mind this signified, and rightly so, the need of unremitting study by every judge of every record and application which comes to the Court for disposition, and the free and frank exchange of views with associates as preliminaries to decision unaffected by extrinsic influences or nonjudicial considerations.

This faith, sustained by his natural fidelity to every task which he undertook, and the force of his example, exercised a powerful and wholesome influence on the deliberations of the Court. Continued without interuption for more than twenty-six years, it would be difficult to overestimate its importance in perpetuating and strengthening this great tradition of the Court. At the conference table he was a tower of strength. When his turn came to present his views of the case in hand, no point was overlooked, no promising possibility left unexplored. His statements were characteristically lucid and complete, the manifest expression of a judgment exercised with unswerving independence. Often his expositions would have served worthily, both in point of form and substance, as the Court's opinion in the case.

He had an abiding faith that reason would afford the solvent for every problem of judicial cognizance. He thought and spoke of this Court as the place for the final appeal to reason in composing the inevitable conflicts growing out of the distribution by the Constitution of the diverse powers of government.

In the provisions of the Constitution, and particularly the Fifth and Fourteenth Amendments, he saw safeguards to those rights and privileges of the individual which he regarded as the chief spiritual values of the society which he had known in his own life and experience. Those who differed with him differed not in their appraisal of such values but in their judgment that an instrument of government, intended to endure for ages to come, could not rightly be interpreted as casting a dynamic society in so rigid a mold. Both were content to resolve their differences by the appeal to reason in the course of adjudication. Both would have regarded as inappropriate and inept the labelling of their differing views of the appropriate boundaries of constitutional power as either conservative or liberal.

Apart from cherished family ties and the association with friends and colleagues, the work of the Court was his chief interest in life. To that he gave of himself to the uttermost and without interruption until the very day of his retirement. He was a man of simple, unobtrusive religious faith; modesty and simplicity were the keynotes of his life. It was a life untouched by any interest in or desire for wealth. He had a large capacity for friendship. He instinctively sought to find in others the qualities which would merit his esteem. His relations with his colleagues were marked by his uniform courtesy and helpfulness and by their mutual regard. In his daily intercourse with them and in the discussion of every pending problem, his statements were direct, forthright, and crystal clear, because they were the true reflection of his thought.

As we recall the years of association in a common endeavor, the clash of mind with mind in the unending struggle to attain in some measure the ideal of justice under law, there lives in memory this man's devotion and loyalty to a great task, the integrity and sturdy independence with which he wrought. For these are the attributes of the judge, without which there can be no justice. They are the foundation stones of the institution which we serve.

THE IMPACT OF THE WAR UPON THE UNITED STATES COURTS*

By HENRY P. CHANDLER

Director of the Administrative Office of the United States Courts

THE war is bound to have a large effect upon the business of the United States courts. Cases in the courts reflect the interests of the people in the period and as those interests change, the business of the courts changes with them. We cannot miss the fact—it is written on every hand—that the war is altering fundamentally the modes of life in this country.

From a nation which was shaping its policies primarily to promote the well-being of its citizens and to keep clear of foreign involvements, the United States is being transformed of necessity and with a speed that passes belief, into a nation which is centering everything upon a war against foreign enemies leagued to destroy it. The immediate interests of individuals have to yield to the survival of the society. In every department of life, business, living habits, travel, and recreation, persons are being subjected to a degree of control in the interest of the nation as a whole to which we have before been strangers. I do not see how any wise man can question the need for this, although there may be a reasonable difference of opinion about specific means, or how any patriotic man can fail to accept it cheerfully. But because life under these conditions is different, and may become much more different before we are through, it is inevitable that new kinds of questions should come before the courts for solution.

Recent Defense and War Measures

It would border on impertinence for me to state in any detail the provisions of the defense and war measures recently enacted, to federal judges who have doubtless considered some or all of them and who certainly will go to the text if occasion to interpret them arises. But a quick review of the trend of some of the more important statutes may perhaps serve to outline the controlling public policy of the nation. They fall conveniently under some very general heads: measures to promote the production of war implements and materials; measures to build up the armed forces; measures to raise revenue to defray the cost; measures to prevent interference at home with the war efforts; and measures to prevent inflation and as far as possible bring about an equitable sharing in the lessened store of commodities for civilian use.

The first phase of the defense policies of the United States related to the production of implements and materials of war: ships, planes, guns, ammunition, and all that goes with them. It developed rather suddenly in the late spring and early summer of 1940, after the downfall of France, the losses suffered by the British forces at Dunkirk, and the dire peril to England which seemed then the last obstacle to the success of German designs in Europe. The collapse of France brought home the danger to this country, and the Congress immediately provided for producing the means of defense on a large scale.

An act "To Expedite National Defense, and for Other Purposes," approved June 28, 1940, which authorized the Secretary of the Navy to secure necessary ships, aircraft and other materials, laid down the rule of priority that orders of material for the army and the navy should take precedence over deliveries for private account.[1] There followed quickly an act "To Expedite the Strengthening of the National Defense," approved July 2, 1940, which authorized the Secretary of War to participate directly in the production of military equipment, munitions and supplies either on military reservations or in private plants.[2] Section 9 of the Selective Training and Service Act of 1940, approved September 16, 1940,[3] authorized the President, through the heads of the War and Navy Departments, to place orders for war materials with private industries capable of producing them, and made compliance with such orders obligatory, taking precedence over orders previously placed by private customers.

The act "To Promote the Defense of the United States," approved March 11, 1941, popularly known as the "Lease-Lend Act,"[4] authorized the President, through the heads of the army and navy, to make implements and materials of war available to "the government of any country whose defense the President deems vital to the defense of the United States." Correspondingly the earlier provision for priorities for materials needed by the army or navy of the United States was broadened to include materials needed by other countries eligible for assistance under the Lease-Lend Act, and also to include orders which the President deemed necessary "to promote the defense of the United States," aside from materials to be supplied directly to the army or the navy. It was in this period that the United States was thought

* An address before the Judicial Conference of the Sixth Judicial Circuit at Cincinnati, Ohio, May 9, 1942.

1. 54 Stat. 676; 41 U.S.C., note preceding Sec. 1. (See also the amendment by Title III of the Second War Powers Act, 1942, approved March 27, 1942; Public Law 507, 77th Congress 2d Session).
2. 54 Stat. 712; 41, U.S.C., note preceding Sec. 1.
3. 54 Stat. 885, 892; 50 U.S.C. App. 309.
4. 55 Stat 31; 22 U.S.C.A. Supp. 411-419.

of most often as the "arsenal of democracy" in the President's expressive term, and about this time, February 9, 1941, that Winston Churchill closed one of his powerful speeches with the famous sentence, "Give us the tools and we will finish the job." A law approved October 16, 1941,[5] authorized the President to requisition the use of military or naval equipment or supplies needed for the defense of the United States upon payment of just compensation, if efforts to secure the use by agreement were unavailing.

Even while the Congress was providing for multiplied production of war materials, it took steps to create a new army based on universal military training and service for eligible men. The Selective Training and Service Act of 1940[6] was approved on September 16 of that year. Passed while a state of technical peace yet prevailed, it limited the period of military training normally to one year. Within a year it was amended by the Service Extension Act of 1941 approved August 18, 1941,[7] which in view of the increasing danger of war, authorized the President to extend the term of service for an additional period of eighteen months or such time as might be necessary in the interests of national defense. The Act of 1940 provided for the machinery of administration based on local boards with large powers to determine questions of fact relating to the amenability of men to military service. Concomitant with the policy of universal military service, the Congress enacted the Soldiers' and Sailors' Civil Relief Act of 1940, approved October 17, 1940, providing in minute detail adapted to various kinds of situations for the suspension of legal proceedings and transactions which might prejudice the civil rights of persons in the armed forces during their service.[8]

The income tax, the principal source of federal revenue, was increased by the Revenue Acts of 1940[9] and 1941,[10] the earlier approved June 25 and October 8, 1940 and the last September 20, 1941. The second increase was very substantial. All reports indicate that a further sharp increase in income taxes is likely this year. There can be little disagreement with the principle that the largest practicable share of the cost of the war should be met by taxation on a current basis, in order to limit as much as possible the increase in the national debt, stupendous at best.

As in every war, vigilance has to be exercised to prevent interference with the war efforts on the part of disaffected persons at home. A number of measures have been enacted by the Congress to this end, and executive action has been taken under other measures long on the statute books, which are largely in disuse except in time of war or preparation for war.

Before the outbreak of the war, the government had been giving new attention to the regulation of aliens. In the group of measures enacted by the Congress in the weeks closely following the downfall of France, was the Alien Registration Act approved June 28, 1940. This required every alien in the United States 14 years of age or over, and the parent or legal guardian of every alien younger than that, to register and be fingerprinted.[11] The process of registration was conducted with remarkable smoothness under the direction of the Attorney General, with the fortunate result that when the war came the great body of aliens in this country were known and identified.

The Nationality Act of 1940, approved October 14, 1940, is a comprehensive code in reference to citizenship, and prescribes the process of naturalization for persons of foreign birth. Section 338 of the Act,[12] which is derived from prior provisions, provides for the revocation of naturalization and the cancellation of the certificate through a proceeding in the district court upon hearing, if the court finds that the naturalization was fraudulently or illegally procured. The familiar species of fraud of this nature is the secret retention of allegiance to a foreign power and the concealment of a purpose to aid it against this country.

The statutes governing the regulation of enemy aliens are derived from an act approved July 6, 1798 in the administration of the second President John Adams, one of the controversial Alien and Sedition Laws that has survived.[13] The present statutes authorize the President by proclamation to direct the conduct of enemy aliens and provide for the restraint and removal of those whom he may deem dangerous or likely to assist the enemy. Under these laws and the proclamations of the President issued under them immediately following the declarations of war, the steps have been taken to intern certain German, Italian and many Japanese persons under the direction of the Departments of War and Justice, which have been widely reported.

An act to prevent interference with the prosecution of the First World War by the United States was enacted June 15, 1917.[14] Sections 1 and 2 of Title I of the act covered the offense of wrongfully obtaining or furnishing to foreign powers information, including photographs, of any of the defense works or means of defense of the United States. Section 1 was amended by an act approved March 28, 1940[15] which increased the maximum term of imprisonment for violation from two to ten years. In order to compel the disclosure of the source of support for propaganda carried on in this country in support of the designs of foreign governments or organizations, the Congress on October 17, 1940,

5. 55 Stat. 742; 50 U.S.C.A. App. Supp. 721-724, amended by Title VI of the Second War Powers Act, 1942, approved March 27, 1942, Public Law 507, 77th Congress, 2d Session.
6. 54 Stat. 885; 50 U.S.C. App. 301-318.
7. 55 Stat. 626; 50 U.S.C.A. App. Supp. 351-362.
8. 54 Stat. 1178; 50 U.S.C. App. 501-585.
9. 54 Stat. 516, 974; 26 U.S.C.A. Supp., entitled "Internal Revenue Acts," 3,15.
10. 55 Stat. 687; 26 U.S.C.A. Supp., entitled "Internal Revenue Acts," 72.
11. 54 Stat. 670, 673; 8 U.S.C. 452.
12. 54 Stat. 1137, 1158; 8 U.S.C. 501, 738.
13. R.S. 4067, 4068, 4069, 4070; 50 U.S.C. 21-24.
14. 40 Stat. 217; 50 U.S.C. 31-42.
15. 54 Stat. 79; 50 U.S.C. 31.

enacted a law requiring that organizations engaging in political activity or civilian military activity in this country, which were subject to foreign control, should register with the Attorney General.[16] The conduct of agents of foreign countries and foreign political parties and organizations engaged in carrying on propaganda in the United States, is regulated in minute detail by an act approved April 29, 1942, to take effect sixty days after that date.[17] The act provides for registration of such agents with the Attorney General with certain exceptions for accredited diplomatic representatives of foreign governments and agents under specified conditions of governments associated with the United States in the war. The act also provides for the fullest disclosure of all the conditions of the agent's activities and for the filing of copies of all propaganda articles with the Librarian of Congress and the Attorney General.

An act approved April 20, 1918[18] in the First World War, made it a crime to injure or destroy war materials or war utilities or to commit sabotage by causing them to be made in a defective manner. By an act approved November 30, 1940, these provisions were broadened to include geographically the Philippine Islands. Also, inasmuch as the United States was not yet at war but it was deemed vitally important to safeguard the equipment and materials being produced for defense, sections were added to apply regulations similar to those established for war, to the production of national defense materials, premises, and utilities.[19] Section 3 of Title II of the act approved June 15, 1917, mentioned above,[20] made it unlawful for the master or crew of a vessel, foreign or domestic, within the territorial waters of the United States, willfully to cause or permit its destruction or injury, and prescribed a penalty, for violation, of a fine of not more than $10,000 or imprisonment for not more than two years or both. The provision for sentence was changed by an act approved March 28, 1940, to make imprisonment in the case of guilt compulsory, and increase the maximum term from two to ten years.[21]

Section 3 of Title I of the act of June 15, 1917[22] prohibited the making of false reports or statements with intent to interfere with the war operations of the United States, and also prohibited under severe penalty any attempt to cause insubordination or refusal of duty in military or naval forces or to obstruct the recruiting or enlistment service of the United States. As a part of the defense measures of the United States prior to entry into the present war, the Congress deemed it necessary to denounce similar interference with the defense activities of the United States. Consequently in the Alien Registration Act of 1940, approved June 28, 1940, Congress prohibited such conduct or the distribution of written or printed matter counseling insubordination or mutiny of any member of the armed forces "with intent to interfere with, impair, or influence the loyalty, morale, or discipline of the military or naval forces of the United States."[23]

The government has recognized that morale in the present war was to be promoted not only by restraining evil-minded persons who would treacherously undermine it, but by equalizing as far as possible the inevitable hardships to the civilian population. One of the most difficult problems in any war is the fair distribution of the reduced store of consumer goods, whether articles of food, or automobiles, or the materials to operate them, and the prevention of skyrocketing prices. Consequently on January 30, 1942, the Congress enacted the Emergency Price Control Act of 1942.[24] Regulations placing a ceiling upon the prices of all the common commodities of life have recently been issued.

The first section of the act enumerates among its aims: to stabilize prices and prevent abnormal increases in prices and profiteering, and to protect persons with relatively fixed and limited incomes from undue impairment of their standard of living. The act provides for two sorts of court action: first, an Emergency Court of Appeals is constituted, consisting of judges thus far designated by the Chief Justice of the United States, Justice Vinson, Associate Justice of the United States Court of Appeals for the District of Columbia as chief judge, and Circuit Judges Magruder and Maris of the First and Third Circuits respectively, as associate judges, with headquarters in Washington, to hear and determine appeals from regulations or price schedules issued by the price administrator in whom the administration of the act is vested. The Chief Justice may add to the number of judges and the chief judge of the court may divide it into divisions. Sessions may be held at such places as the business may require. The decision of the price administrator shall be sustained unless it is established to the satisfaction of the Emergency Court of Appeals that "the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious." Second, jurisdiction to try criminal charges of violation of the act is vested in the United States district courts, and jurisdiction of other than criminal proceedings brought on account of violations is vested in the United States district courts concurrently with the state and territorial courts.

Appearance of Defense and War Cases in the Courts

Comparatively few cases arising under the recent defense and war measures have yet found their way into the courts. The statutes are too recent. Issues have not had time to develop. Two types of cases directly related to preparation for war which showed the effect of the international tensions some time before war was declared, are condemnation and naturalization cases.

16. 54 Stat. 1201; 18 U.S.C. 14-17.
17. Public Law 532, 77th Congress, 2d Session.
18. 40 Stat. 533; 50 U.S.C. 101-103.
19. 54 Stat. 1220; 50 U.S.C. 101, 104-106.
20. 40 Stat. 220; 50 U.S.C. 193.
21. 54 Stat. 79; 50 U.S.C. 193.
22. 40 Stat. 219; 50 U.S.C. 33.
23. 54 Stat. 670; 18 U.S.C. 9.
24. Public Law 421, 77th Congress, 2d Session.

The condemnation cases brought by the United States to acquire land for military and naval purposes have increased by leaps and bounds. 1,783 such suits were begun throughout the country in the fiscal year 1941 as compared with 1,158 in the fiscal year 1940, an increase of more than half. Included in these proceedings were nearly a million and a half acres or upwards of 2,340 square miles, more than thirty times the area of the city of Cincinnati.

Condemnation by the government is proceeding on an even larger scale in the fiscal year 1942. In the first six months nearly as many proceedings were begun as in the entire fiscal year 1941 and nearly three times as many as in the first half of that year. This rate of filing was almost maintained in the third quarter of this fiscal year ending March 31 last. In the Sixth Circuit, 206 out of the 795 United States civil cases filed in the districts in the first half of the current fiscal year, or more than a quarter, were condemnation cases, and of the 206, 128 or more than half were brought in the Eastern District of Tennessee.

The number of naturalization petitions has risen in the last few years, due to various factors: among them old age pension laws requiring the recipients of benefits to be citizens, rules of many employers including the United States and particularly employers engaged in defense work, that only citizens will be employed, and desire on the part of persons of German and Italian origin to be saved from the difficult position of enemy aliens if war came, as it did. The law of 1940 requiring the registration of aliens stimulated many to seek naturalization.

In each of the fiscal years 1940 and 1941, the number of petitions for naturalization filed with the courts was around 278,000, nearly a third more than in 1939. The number of declarations of intention filed with the courts was upwards of 200,000 in each year, likewise about a third more than in the years last preceding. These figures include proceedings in both the federal and state courts, but much the greater part are in the federal courts.

779,358 preliminary applications looking toward naturalization were filed with the Immigration and Naturalization Service in the fiscal year 1941, more than 200,000 or over 40 percent in excess of the number in the previous year.[25] In regular course most of these applications will eventuate in naturalization proceedings in the courts, so that the prospect is that the volume of such business will continue for some months to come. The additional burden of clerical work cast on the clerks' offices by the naturalization proceedings is heavy. A considerable number of temporary deputies have been authorized and distributed among the clerks' offices to deal with it. Even so it is not possible always to compensate fully, and sometimes not at all, for the increased load, and the fidelity with which the clerks' personnel are meeting these and other demands upon them at this time is appreciated.

It does not appear that any considerable part of the criminal cases in the federal courts in the fiscal year 1941 grew out of violations of the defense statutes. Of the total number of defendants recorded in such cases, nearly 50,000 (subject to some reduction uncertain in extent for duplication of defendants), 473, or less than 1 percent, were charged with violations of the Selective Service Act, 56 with offenses in reference to alien registration, 3 with espionage, 117 with sabotage and 6 with sedition.

Quantitatively, except for condemnation and naturalization proceedings, the effect thus far upon the work of the courts of the defense and war measures is not very evident. But no such extensive program of channelling the energies of the nation into one course, bringing changes often drastic into the lives of almost all persons, could be put into operation without raising problems of interpretation and application that will be for the courts to decide. In the last war the marked effect upon the business of the courts did not appear until the second and third years.

Little change occurred in the amount of private civil business of the federal courts during the First World War. But the civil cases in which the United States was a party, after dropping from 3,534 in the fiscal year 1917 to 2,877 in 1918, increased in 1919 to 4,973 or about 40 percent above the number two years before. The criminal cases jumped 80 percent between the fiscal years 1917 and 1918 and went up 35 percent between 1918 and 1919.

The principal factor in the increase of criminal cases in the previous war was selective service cases, which went from 265 in the fiscal year 1917 (including less than three months of the war) to 11,809 in 1918 and 15,262 in 1919. The espionage cases were 988 in the fiscal year 1918 and 20 less in the next year. More than half of the over 15,000 selective service cases in the fiscal year 1919 were concentrated in the Southern District of New York, 7,779. The Southern District of Ohio had the highest number in the Sixth Circuit for the two fiscal years 1918 and 1919, 404, and the districts in the circuit following most closely were Eastern Michigan with 156, Northern Ohio with 155, Western Michigan with 152, and Western Kentucky with 144. In the same two years, 1918 and 1919, there were 56 espionage cases in Eastern Kentucky, 41 in Northern Ohio, 22 in Eastern Michigan, and a few cases in each of the other districts.

The experience of the First World War would indicate that the impact of the war upon the courts will come slowly but that it will come. Already cases related to the new national policies are beginning to appear. My source of information is occasional reports of cases which are only a fraction of the number presented. I do not doubt that all of the judges here have considered cases under one or another of the new laws, that are unknown

25. Annual Report of the Attorney General for 1941, 239.

to me. Even so in the newspapers and in current legal reports, I have noted accounts of cases that seem to me significant of kinds of questions that are likely to engage increasingly the study of the courts.

A short time ago suits were filed by the Department of Justice, at the instance of the War Production Board, in Wilmington and Pittsburgh seeking to enjoin large steel producers from using iron and steel to fill orders for private customers in alleged disregard of priorities for military and essential civilian needs of the government. The same day a tire dealer was indicted in the District of Columbia and charged with fraudulently marking and selling new tires as used goods.

Very early the constitutionality of the Selective Service Act of 1940 was attacked. It was argued that military training and service could not be compelled in time of peace. In cases in the Southern District of New York[26] and the District of Oregon,[27] the provision for universal registration was held valid, aside from the question of constitutionality of the training provisions. In the Districts of Idaho[28] and Eastern Pennsylvania[29] and the Circuit Court of Appeals for the Second Circuit,[30] the constitutionality of the Act as a whole, including the provisions for training and service in time of peace, was upheld.

In a number of cases it has been decided that the determination by the selective service boards of questions of fact in regard to amenability to service, such as age or the existence of dependents of the persons selected, will not be disturbed by the courts unless it appears that the boards did not give a fair hearing or that their decisions were plainly arbitrary or capricious.[31] On the other hand, in one case in which a selective service board rejected a claim of dependency of a wife, on the ground that the marriage occurred after the submission of her husband's questionnaire and his physical examination, although pursuant to an engagement beginning many months earlier and reported in his questionnaire, the District Court for the District of New Jersey held in a habeas corpus proceeding, that the local board and the board of appeal acted arbitrarily in rejecting the claim of dependency, and that the subject was entitled to deferment.[32]

The total number of tax suits brought for and against the United States declined from 504 in the first half of the fiscal year 1941 to 409 in the first half of the fiscal year 1942, and the number of such suits brought in the third quarter of the present fiscal year showed a further decline. It seems likely, however, that the increased rates under the recent and prospective tax laws, increasing as they will the consequences of differing interpretations, will in time produce new tax cases for the courts.

The Supreme Court decided early in 1941 that by passing the Alien Registration Act of 1940, Congress had shown an intention to exercise exclusive control of aliens in the country, and a statute of Pennsylvania on the subject was held unenforceable.[33] There have already been a number of decisions on the rights of enemy aliens in the courts.

The Supreme Court declined to entertain a motion of the Italian Ambassador, filed before the declaration of war but decided afterward, to stop the United States District Court for the District of New Jersey from proceeding with a case in reference to a vessel and its cargo of oil alleged to belong to the Italian government. The Court said, citing Section 7B of the Trading with the Enemy Act, that, "War suspends the right of enemy plaintiffs to prosecute actions in our courts."[34] The United States District Court for the Southern District of New York applied the same rule to citizens of Finland as an ally of Germany, and stayed an action brought by them for a recovery on account of injuries suffered while they were visiting in New York.[35] In a case decided in the Eastern District of Pennsylvania it was held that citizens of Germany, even though resident in this country, could not prosecute an action in the courts, and a suit brought by them for personal injuries must be stayed for the duration of the war.[36]

On the other hand, the Attorney General of the United States, in a release by the Department of Justice on January 31, 1942, indicated that an alien enemy residing peaceably in the United States loses none of his rights in the courts. The Attorney General said:

> It is important to note that no native, citizen or subject of any nation with which the United States is at war and who is resident in the United States is precluded by federal statute or regulations from suing in federal or state courts.

The District Court for the District of Columbia has held that an action brought by an Italian citizen resident in the district will not be stayed, and that he may proceed with his suit, saying that "Only *non-resident* alien enemies are barred from prosecution of suits."[37] This is believed to represent the preponderant opinion as reflected by the reported cases in the federal and state courts. It was held by the United States District Court for the Southern District of New York, in a case involving a Japanese steamship,[38] that even though an enemy power cannot now prosecute proceedings in the courts it will nevertheless be entitled to a stay of proceedings in a suit against it, because, as the court said,

> The right to defend is inherent in our jurisprudence and should be accorded to alien enemies as well as to others.

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26. *United States v. Rappeport*, 36 Fed. Supp. 915.
27. *Stone v. Christensen*, 36 Fed. Supp. 739.
28. *U. S. v. Cornell*, id. 81.
29. *U. S. v. Garst*, 39 Fed. Supp. 367.
30. *U. S. v. Herling*, 120 Fed. (2d) 236.
31. *Dick v. Tevlin*, 37 Fed. Supp. 836 (S.D., N.Y.) *Petition of Soberman*, id. 522 (E.D., N.Y.) *U. S. ex rel. Filomio v. Powell*, 38 Fed. Supp. 183 (D.N.J.) *U. S. ex rel. Ursitti v. Baird*, 39 Fed. Supp. 872 (E.D., N.Y.)
32. *Application of Greenberg*, 39 Fed. Supp. 13 (D.N.J.)
33. *Hines v. Davidowitz*, 312 U. S. 52.
34. *Ex parte Colonna*, 314 U. S. (Preliminary Print) 510.
35. *Sundell v. Lotmar Corporation*, C.C.H. War Law Service, Par. 9710.
36. *Bernheimer v. Vurpillot*, 42 Fed. Supp. 830.
37. *Uberti v. Maiatico*, C. C. H. War Law Service, Par. 9711.
38. *Spreckels Co. v. S.S. Takaoka Maru*, C.C.H. War Law Service, Par. 9707.

The measures taken by the government to remove enemy aliens, who are deemed dangerous to the United States, from their homes and places of work or business will have far-reaching effects upon the lives of many persons, as well as upon industry in some parts of the country. The regulation of the conduct of enemy aliens in time of war is, however, a matter within the exclusive discretion of the President, under the statutes, and his action in this matter is not subject to judicial review.[39] Questions whether persons treated as aliens are in fact aliens or citizens, and whether citizens of the United States, of racial stocks with which the United States is at war, when proceeded against, have rights which the courts will protect, may be subjects for judicial consideration. Suits to revoke certificates of naturalization, on the ground that the professions of allegiance to the United States were false, are likely to come in a considerable number.

Although the number of criminal cases thus far coming before the courts based upon attempts to interfere with the defense and war efforts of the United States is not great, there have been important cases of this kind. Persons have been convicted of carrying on propaganda for foreign nations or organizations under foreign control without registering as such agents as the law requires. Groups of persons have been convicted of espionage in obtaining information concerning the defense plans or instrumentalities of the United States for the purpose of furnishing it to foreign nations. Crews of foreign vessels interned in American ports, have been convicted of willfully injuring such vessels in order to render them as nearly as possible useless to the United States.

Prosecutions for criminal sedition are beginning. Many reasonable and patriotic men are calling for the suppression and punishment of those who foment racial animosities, vilify our allies and officers of the government, and belittle the war efforts. At the same time a distinguished English jurist now in this country, Sir Norman Birkett, Judge of the King's Bench Division of the High Court of Justice, is quoted as saying that the English attitude is "that no paper should publish anything which would injure the war effort, but also that the government should not have the autocratic, anti-democratic power of suppression."

If the experience of the last war is any criterion, the courts of this country will be called upon to decide many times whether statements spoken or published in opposition to the conduct of the war are in the nature of permissible criticism protected by the Bill of Rights, whether right or wrong, whether well or ill intentioned, or whether they are in so far an incitement to disobedience to government and obstruction to enforcement of the measures ordered by the nation for its protection, that they cross the bounds of free speech; that when the nation is at war, in the language of Justice Holmes, they are "such a hindrance to its effort that their utterance will not be endured so long as men fight."[40] No graver responsibility can come to a court than to hold the balance between the necessary power of the nation to take measures for the common defense and make it effective on the one hand, and on the other the right of reasonable discussion, which is as important in a democracy in war as in peace, perhaps more important.

Overcoming the Handicaps of War Conditions

I have endeavored to suggest only a few examples of the questions which I see arising out of the war for the determination of the courts. Unless the signs fail the business which the courts will be called upon to handle, both in volume and in the momentous nature of the issues, will make severe demands upon the judicial energies. At the same time it is inevitable that the war should to some extent impair the assistance available to the courts in the discharge of their duties.

The withdrawal of administrative officers and employees of the courts to enter military service has not gone very far yet, but it is beginning and the rate is accelerating. A total of 46 persons are now on military leave, 8 law clerks and secretaries to judges, 19 members of staffs of clerks of courts, 15 probation officers, and 4 members of the staff of the Administrative Office. The departure of others is impending. I should expect the heaviest inroads to come in the classes of law clerks to judges and probation officers, in both of which there is a relatively high proportion of young men. The replacement of persons entering the service is made harder by the fact that the positions must be held open for the incumbents when they return and only temporary appointments can be offered.

The courts are also suffering from the resignation of many of their assistants to accept positions in war agencies of the government or in private employment at higher salaries. Changes in personnel are necessarily frequent. The unfamiliarity with the tasks of persons selected for replacements impedes the work. Moreover replacements cannot usually be made without delay and sometimes not at all, because of the scarcity of qualified persons at the present salaries. In a time of rising wages an established office with fixed scales of compensation is always at a disadvantage in comparison with new agencies or private enterprises with more flexible budgets. I fully realize these difficulties, but can do little to alleviate them.

With the authority of the Judicial Conference of Senior Circuit Judges, I asked the Congress in the appropriation for 1943, to provide funds for raising the salaries of the large classes of employees of the courts who are in the clerks' offices and the probation offices. As to the first, the Appropriations Committee of the House of Representatives in its report expressed sympathy, but did not see its way clear in this time of mounting expenses for war, to take any action. As to the second, the House gave substantial relief and if the

39. *Lockington v. Smith*, 1 Pet. C.C. 466, Fed. Cas. No. 8448 (C.C.Pa.).
40. *Schenck v. United States*, 249 U. S. 47, 52.

bill passes the Senate in the present form, there will be funds to raise the minimum salaries of probation officers from $2,000 to $2,300 per annum and of probation clerks from $1,260 to $1,440, and provision is also made for 25 additional probation officers and 15 additional probation clerks. It was the economic value of probation that led the House to provide the addition of nearly $100,000, noteworthy in this time, to the funds for the probation service.

There are other difficulties than the turnover in personnel, such as the necessary restrictions upon the use of automobiles. Where automobiles are necessary for the conduct of the work as in the case of probation officers, the rationing agencies have shown themselves considerate. I do not doubt that they will evince a like attitude toward judges in situations in which the use of an automobile can be justified on the ground of contribution to the efficient dispatch of the work rather than personal convenience. A recent application of the policy of priorities affecting the offices of the courts along with other offices, is the stoppage of the supply of new typewriters and office machines. This will compel the courts to look to an indefinite extension of the use of their present machines, supplemented if need is urgent by machines which can be rented.

At the best the war is bound to have a limiting effect upon the resources of the courts outside of that great capacity which resides in the judges themselves, and which is the heart of the judicial system. Only by drawing upon the reserve power which is there can we meet the needs of the day. The present it seems to me is of all others a time that calls upon us all for maximum inventiveness and maximum effort toward the overcoming of obstacles. If cases increase, the largest use of pretrial procedure may help in dispatching them. Lengthening the hours of court may be necessary. In the large administrative offices such as those of clerks of court and the probation offices in the great cities, continuous study by the heads of ways and means of using their slender forces to the best advantage will do much. When this intelligence is supported, as I am happy to say it is, by devotion that does not shrink from long hours and hard work, I am confident that strength will be equal to the task that is given us.

In a time like the present we may be in danger of holding too cheaply the judicial function in which we are participating in our various ways. The operation of the courts may seem of little importance when the issue whether governments that respect courts will survive is in the balance. Yet we who for one reason or another, age or conflicting duties, are not called, not even useful for military service, can, I dare to say, make a real contribution to the ultimate victory of this country by raising to the highest standards of efficiency and service the judicial institutions with which we are connected. Let us have faith that that country which is best worth preserving will in the end be preserved. In that faith let us give all that in us lies to make the courts of the United States the best instrument of justice of a free people.

THE NATIONAL WAR LABOR BOARD*

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IV

Board Policies in Adjudicating Disputes

The Executive Order provides that "the Board shall finally determine the dispute." It would appear to have authority, therefore, in any case over which it has jurisdiction, to prescribe any of the conditions of employment where necessary to the settlement of a labor controversy, assuming of course that the conditions which it prescribed were not in conflict with law.

Labor disputes heretofore decided by the Board or now pending before it include controversies over wage increases, bonuses, union security, insurance coverage, seniority rights, hours of labor, swing and night shifts, training of new employees, grading for salary classifications, union representation, overtime premiums for Sundays and holidays, union jurisdiction and many other conditions of employment. As was noted before, no standards or policies were furnished the Board to guide it in its decisions at the time of its creation, and, except with respect to wage increases,[55] none have been given it since; nor has the Board announced the general policies which it will follow in determining the several issues which are coming before it.

The absence of either a specific or general policy to guide the Board in its action has been the subject of lively debate. It has been urged that the failure to furnish the Board with such a policy results in placing too much responsibility upon it—a responsibility which it may be unable to assume and survive; that the inevitable effect of having no controlling policy is to encourage parties to come before the Board in an effort to obtain more than they can in collective bargaining; and that if the "rules of the game" which are to be followed were announced, most disputes would be settled by the parties without recourse to the Board.[56]

*Concluded from the June issue of the JOURNAL, page 395.

55. See President Roosevelt's message to Congress on Cost of Living Controls, April 27, 1942, hereafter discussed in the text of this article.

56. In this connection see speech by William M. Leiserson, member of NLRB, on "Labor Relations and the War," delivered at the College of the City of New York, Feb. 18, 1942.

On the other hand, it has been vigorously contended by one of the public members of the Board that flexible policies are needed if the Board is to accomplish its primary purposes, namely, the peaceful settlement of labor disputes during the war period, to the end of promoting the maximum production of war goods; that the Board is using a common law system of approach to the adjudication of labor disputes; and that in a period of a few months it will build up a record of sound principles which will guide labor and employers to orderly and peaceful settlement of their differences.[57]

While the Board has repeatedly stated that it considers and decides each case on its merits, it is difficult to see how it can escape recognizing precedent as a factor in cases settled through Board decision. In this connection, it should be noted that there is an important difference between the settlement of a dispute by mediation or voluntary arbitration and a settlement by compulsory arbitration or a decision of the Board. In the first two, the parties either consent to the terms of the settlement or agree upon the methods by which a settlement will be made. But, in a settlement of the last type, the element of consent or agreement of the parties is not present. The terms of the decision are imposed upon the parties by government order.

An analysis of Board decisions, after a sixteen week period, demonstrates, however, that standards of a general nature are being rapidly developed on a case to case basis and that a pattern of precedent will soon enable the parties reasonably to determine the broad principles within which a given dispute will be decided.

The dominant policy of the Board is to settle disputes in a manner which will tend to speed up production and avoid slowdowns or anything which will decrease the output of goods for the war.[58] But numerous other considerations enter into a decision depending upon the particular issue in controversy. Time and space limit examination here to disputes over union security and wage increases.

Union Security:[59]—Union security in some form or another is an issue in many of the cases coming before the Board. It is often advanced by the unions for trading purposes only and later abandoned. As of May 1, there were five cases in which the Board had granted some measure of union security—namely, in the matters of Marshall Field & Company, Bower Roller Bearing Company, Walker-Turner Company, International Harvester Company, and Federal Shipbuilding & Dry Dock Co.[60] The security took the form of "maintenance of membership" in each case except Bower Roller Bearing. In the latter case, a demand for a union shop was rejected but a check-off ordered, applicable to all union members who "voluntarily agreed in writing" to the deduction and to all present and future employees who "voluntarily join the union."

"A maintenance of membership" clause was ordered in a textile mill in the Marshall Field case, applicable to only such employees as "individually and voluntarily certify in writing that they authorize dues deductions, and will as a condition of employment maintain their membership in the union in good standing during the life of the contract."

In the case of Walker-Turner Company, the Board, in an order issued April 8, made "maintenance of membership" a condition of continued employment, for all "production and maintenance employees who are now or who on November 27, 1941, were or since have been" union members and all those who hereafter join the union, unless the employee agrees in writing to deductions by the employer to pay the union sums equivalent to union dues and fines.

The Board also made "maintenance of membership" a condition of employment for all the employees in eight plants of the International Harvester Company "who are now" or "who in the future" become members of the union, provided that a majority of the union employees affirmatively approve of the provision by secret ballot.

In the case of Federal Shipbuilding & Dry Dock Co., the Board ordered the inclusion in the contract of a clause requiring each employee "who was a member of the union in good standing as of the date of the signing of the agreement, or who hereafter voluntarily becomes a member" to maintain his membership as a condition of employment, or in the alternative, authorize deductions by the employer to pay the union sums equivalent to union dues and fines.

It will be observed that there are significant differences in these union security orders with respect to the opportunity of present employee members of the union (a) to elect whether they will be bound thereby or (b) to "escape" from the order after issuance but before its effective date by resignation from the union. In the Bower Roller Bearing and Marshall Field cases, the

57. See address by Wayne L. Morse, Public member of the NWLB, on March 21, 1942 before International Juridical Association, NWLB release B7 (March 21, 1942).

58. This policy is expressed in most of the decisions of the Board. See also address of Wayne L. Morse, *supra* note 57.

59. The term "union security" has been used to refer to any clause of a collective bargaining agreement which seeks to protect the strength of a union but, as used by the writer, it refers only to the following: *Closed shop:* where all persons employed are required to be union members when hired and must remain members during employment. *Union Shop:* where all persons employed are required within a specified time after hiring to become and remain union members. *Maintenance of Membership or Union Maintenance:* where all employees who at time of contract are union members or thereafter become members must maintain membership as a condition of employment. *Preferential Hiring:* union members are giving preference in hiring. *Check-Off:* where the employer is required to make deductions of union dues from members' pay and transmit it to the union.

Many variations will of course occur in the use of these types of union security.

60. Marshall Field Co., NWLB release PM 2642 (March 6, 1942); Bower Roller Bearing Co., case No. 12, NWLB release B1 (March 12, 1942); Walker-Turner Co., case No. 17, NWLB release B31 (April 10,1942); International Harvester Co., case Nos. 4, 4a and 89 consolidated, NWLB release B33 (April 15, 1942). Federal Shipbuilding & Dry Dock Co., NWLB release B45 (April 25, 1942).

conditions of the orders were subject to the *individual* approval of the employee members. In the Walker Turner case the order was made unconditionally and retroactively effective, as to employee members of the union. In International Harvester there was no opportunity to resign before the order became effective but its application was subject to a favorable vote of the majority of the union members, while in the Federal Shipbuilding case, there was an opportunity to resign from the union after the issuance of the order but before it became effective.

Dr. Frank P. Graham, a public member of the Board, in writing the majority decision in the Federal Shipbuilding case described "maintenance of membership" as follows:

> The maintenance of membership clause does not require any worker, at any time, to join the Union. It does not require the Company to employ only members of the Union and is, therefore, not a closed shop. It does not require the employees who have been hired by the Company, to join the Union, and is, therefore not a union shop. It does not require the Company to give preference in hiring to members of the Union, and is, therefore, not a preferential union shop. It does not require any old employee, any new employee, or any employee whatever to join the Union at any time.
>
> The maintenance of membership clause requires only that any employee who is a member of good standing, at the time the contract is signed, or who thereafter voluntarily joins the Union, shall remain a member in good standing. This he is required to do as part of his obligation to keep the provisions of the contract made by the Union with the Company on his behalf.

The facts in the few cases in which the Board has ordered "maintenance of membership" show either an unhealthy relationship between the union and employer or the existence of rival unions in the same plant, and as a consequence an unstable labor situation in which the union is obliged to dissipate its energies unnecessarily in an effort to retain its strength. In the Walker-Turner Company case, the pertinent facts were the Company's uncooperative attitude toward organized labor, wages lower than the scale paid for comparable labor and because of the financial policy of the company the higher rate would bankrupt the company, and a substantial dues delinquency.

The Board in the International Harvester Company case ordered "maintenance of membership," observing "the history of company-union relationship has not been a pleasant one" and that "the record discloses a background of bitter rivalries between strong, contending unions," adding that the clause would increase industrial harmony in the plants and enhance the production of war goods.

In the Federal Shipbuilding case the employer refused to comply with a recommendation of the National Defense Mediation Board and include a "maintenance of membership" clause in its Kearney contract. Its Kearney plant was seized by the government but later returned to the company. All this time there was trouble with the newly organized local independent union, an increase in the number of grievances against the employer and a relative loss in the number of members in the union in good standing.

These cases proceed upon the philosophy that "a stable, responsible union is better for management than an unstable and irresponsible union" and, that "cooperation between the company and union for the maintenance of membership can make for the cooperative maintenance of production at higher levels."

On the basis of past action, the union security ordered by the Board may be expected to most frequently take the form of "maintenance of membership." The Board's policy in this regard is following that of its predecessor, the National Defense Mediation Board, which showed its preference for this form of security by recommending it in seven cases.[61]

Employer members of the Board are in sharp disagreement with the majority on the question of union security. They wrote vigorous dissents in the cases of Walker-Turner Company, International Harvester Company and Federal Shipbuilding & Dry Dock Co. While they appear to recognize need for some form of union security, they argue that the Board should not make union membership a condition of continued employment in any case unless (a) the employees individually and voluntarily agree thereto, or, unless (b) the agreement ordered contains an "escape clause" under which employees who are union members will be given a definite opportunity, within a stated time, to resign from the union. They also contend that a policy of "maintenance of membership" will lead to a closed shop. The majority, however, in the Federal Shipbuilding case stated:

> . . . the War Labor Board . . . thus far has not made a decision for a closed shop or for a union shop or for a preferential union shop. . . . the War Labor Board, according to its judgment of the merits, has made decisions for union security in accordance with what the majority could unite on as noted in the case. The War Labor Board does not have an open shop policy and does not have a closed shop policy. It examines thoroughly the facts and considers the circumstances and equities in each case and attempts to arrive at a just decision in each case.

Wage Increases:—On April 27, President Roosevelt sent a message to Congress on costs of living controls, expressing policies which he said would guide all government agencies. With respect to wage increases the message stated:

> To keep the cost of living from spiraling upward, we must stabilize the remuneration received by individuals for their work. . . . seeking to stabilize remuneration for work, legislation is not required under present circumstances. I believe that stabilizing the cost of living will mean that wages in general can and should be kept at existing scales. . . . all stabilization or adjustment of wages will be settled by the War Labor Board machinery which has been generally accepted by industry and labor for the settlement of all disputes.
>
> All strikes are at a minimum. Existing contracts between

61. See Jaffe-Rice Report pp. 9-15 *supra* note 2.

> employers and employees must, in all fairness, be carried out to the expiration date of those contracts. The existing machinery for labor disputes will, of course, continue to give due consideration to inequalities and the elimination of substandards of living. I repeat that all of these processes, now in existence, will work equitably for the overwhelming proportion of all our workers if we can keep the cost of living down and stabilize their remuneration.[62]

At a press conference on April 29, the Chairman of the Board, William H. Davis, declared that the President's policy did not prevent upward wage adjustments to remove inequalities and substandards of living but, that it will not permit increases in wages which the Board now considers as "standard." He insisted that the policy would permit "flexibility." He defined the standard wage as the wage arrived at through "real collective bargaining at the time it was agreed to."[63]

In the light of this newly announced policy the value of examining past decisions as an aid to practice before the Board might well be doubted. But an analysis of the factors which the Board has considered in wage decisions heretofore suggests that many of them will continue to play a determinative part within the reduced area of Board discretion.

Past decisions show that the principle factors which have been given weight in determining wage issues are as follows:

(1) The relationship of the wage of the employer to those paid by competitors for similar work, (a) in the same area and (b) in the country at large.

(2) The relationship of the wage of the employer to those in other industries in the same area.

(3) The change in costs of living since the last wage adjustment.

(4) The ability of the employer to pay the wage and his recent record of profits.

(5) The need for an increased wage to maintain a standard of living of health and decency.

(6) The need for an increased wage to improve morale and provide greater incentive for production.

(7) The efficiency of the employees of the employer when compared with those in competitive plants.

Thus each of these factors, except two and seven, were considered by the Board in the International Harvester Company case *(supra)* where the union demanded a general wage increase of 12½c per hour and were granted 4½c per hour. In this case the Board articulates fully its reasons for granting wage increases and it is believed that the decision, more than any other, approximates its present wage policy.

In the case of Bower Roller Bearing Company *(supra)*, the Board granted an hourly increase of 4½c and appeared to justify its action on increased costs of living, the ability of the employer to pay it and the greater efficiency or productivity of the workers. In doing so, however, it admitted that the present wages are the highest in the roller bearing industry and are equal to the general rates of the automobile industry in the Detroit area where the employer's plant was situated.

The Board ordered a 5c per hour increase in Babcock & Wilcox Company, Barberton Works,[64] observing that while wage increases of the company have kept pace with costs of living increases, the economic merits of the question must depend on factors of general adequacy. The increase was justified on the basis of average rates paid in comparable industries and ability of company to pay it without undue hardship.

In the case of St. Louis Smelting & Refining Co.,[65] the Board ordered wage increase of 25c per day. The company paid average rates where wage standards were relatively low in comparison with those paid in other producing areas. The Board said that in the consideration of what was a proper wage, it should not be restricted to the average wage paid by non-union competitors of the St. Louis area, but should "take into account the rates paid in the Tri-State area as a result of collective bargaining."

The Board denied the request of a CIO union to pay employees of the Phelps Dodge Corporation, Douglas, Arizona,[66] rates conforming to labor agreements in other areas of copper production such as Utah, Montana and Idaho, on the ground that they were in excess of the wage rates prevailing in Arizona mines as a result of the company's collective bargaining agreements with AFL unions, and that to grant the increase requested would slow up production by creating artificial competition between the two unions on the scene.

In the case of the Aluminum Company of America,[67] the union contended that the wage differentials among the employer's plants in the North and South should be eliminated and all rates adjusted accordingly. The Board reduced the differentials substantially but did not eliminate them, and in making its decision, gave consideration to existing wage differentials; the ability of the company to pay the increase; the similarity of work in Northern and Southern plants of the Company; comparative costs of production in the two areas; costs of living changes; average wage differentials in the trade; and the effect of narrowing wage differentials on labor morale.

In concluding its observations, in the latter case, the Board stated that "the Board would call attention to the obvious fact that the relative and comparative weights which are given to any set of wage factors such as those involved in this case, are bound to vary from case to case in light of the evidence and wage data submitted by the parties. There is no pat formula or rule of thumb which can be applied with mathematical

62. See *supra* note 55.
63. The Washington Post, pp. 1 and 6, April 30, 1942.
64. Babcock & Wilcox Co., Barberton Works, NWLB release PM 2581 (Feb. 25, 1942).
65. St. Louis Smelting & Refining Co., case No. 9, NWLB release PM 2525 (Feb 21, 1942).
66. Phelps Dodge Corp., Douglas, Arizona, case No. 5, release PM 2524 (Feb. 21, 1942).
67. Aluminum Co. of America, case No. 66, NWLB release PM 2473 (Feb. 10, 1942).

precision to a wage issue. The human factors as well as the economic ones tend to make the task of determining a wage issue primarily one of exercising common sense judgment, and in applying the same to the record submitted by the parties. Or to put it another way, it involves a balancing of interest." This decision acknowledges what the cases clearly reveal—namely, that there are too many variables in wage determination cases to permit the parties to rely with any degree of certainty upon any particular factor or set of factors.

Comparison of Policy Governing the National War Labor Boards of the First and Second World Wars:—In comparing the present Board with the Taft-Walsh Board, it is sometimes emphasized that the former does not operate under any ruling policy while the latter was given a set of fixed principles at the time of its creation by President Wilson. Any such generalized distinction however exaggerates the difference between the two.

The principles which the Taft-Walsh Board were directed to observe included—(1) the right of workers to organize and bargain collectively without employer interference, (2) the maintenance of the then existing conditions with respect to the "union shop," (3) the continuance of health and safety safeguards, (4) equal pay for equal work for women who perform work ordinarily performed by men, (5) recognition of the eight-hour day where existing law requires it and the settlement of hours of labor in other cases with due regard to governmental necessities and the health and welfare of workers, (6) maintenance of maximum production (7) when fixing wages, hours and other conditions of employment, "regards should always be had to the labor standards . . . prevailing at the locality affected," (8) establishment of minimum rates of pay to insure subsistence of worker and family in health and reasonable comfort.[68]

These principles are so broadly stated that they serve more as a grant than a limitation on power and allowed the Taft-Walsh Board a wide range of discretion as is evidenced by its awards. Thus it had no uniform rule as to hours of work, either for the day or for the week,[69] nor as to the payment of overtime.[70] Principles covering wage awards varied considerably—being based upon the customs of similar plants in the same locality, similar plants operating elsewhere, rates paid by the government for work done in other places than the plant involved in the dispute, increase in costs of living, and the necessities of subsistence.[71]

More than three months after the Taft-Walsh Board had been in operation, it recognized the generality of these principles and the need for case experience before formulating definite rules, in a resolution which, in part, provided:

> That for the present, the Board or its sections should consider and decide each case involving these principles on its particular facts and reserve any definite rule of decision until its judgments have been sufficiently numerous and their operation sufficiently clear to make generalization safe.[72]

It will be noted that most of the principles which were formulated to guide the Taft-Walsh Board have been written into law and necessarily will govern the present Board. In view of this fact and in the light of the announced policy of the President on wage stabilization, the differences in the established policies controlling the action of the two boards appear to be slight—that is, with respect to matters over which the two boards were given similar jurisdiction. But the jurisdiction of the two boards has one important difference. The Taft-Walsh Board was given a directive to maintain existing conditions as to the "union shop,"[73] and either as a result of this directive or Board policy, no awards were issued granting any measure of union security.[74]

The jurisdiction of the present board on the other hand, as has been shown before, includes the determination of disputes over union security, with respect to which no general policy has been provided, either by the Congress or the President, comparable to that existing on other controversial issues.

V

Enforcement of Board Orders

The Executive Order creating the Board grants it no legal authority to enforce its decisions.[75] The Board must rely upon the support of public opinion and the war powers of the President to secure obedience to its orders, which together, condition the atmosphere in which the Board works, giving it a position of prestige and respect and reducing resistance to its decisions to a minimum. But the position which the Board occupies with respect to the power to enforce its orders, is little different from that of the ordinary peacetime regulatory agency. The latter has no authority to issue compulsory process where its orders are defied but must resort to the courts to obtain compliance. The Board being the creature of the President rather than the legislative branch looks to him instead of the courts for the execution of its orders against recalcitrant parties.

It should also be mentioned parenthetically that, where the parties to a dispute reach an agreement through the mediatory efforts of the Board or voluntarily submit their differences to arbitration, a con-

(Continued on page 506)

68. Bul. of U. S. Bur. of Labor Statistics (No. 287), pp. 32, 34, *supra* note 7.
69. *Ibid.*, pp. 71-87.
70. *Ibid.*, pp. 72, 73, 74, 75, 78, 79, 80-83.
71. *Ibid.*, pp. 90-104.
72. *Ibid.*, p. 35.
73. *Ibid.*, p. 32.
74. Awards were issued, however, requiring the continuance of closed shop contracts where they had existed before, and the negotiation with union committees to the same extent as theretofore, *Ibid.*, p. 64.
75. Ex. Or. No. 9017, *supra* note 5.

WHAT CHANGES IN FEDERAL LEGISLATION AND ADMINISTRATION ARE DESIRABLE IN THE FIELD OF LABOR RELATIONS LAW*

By ALBERT SMITH FAUGHT

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THERE is a phrase in one of Sir Frederick Pollock's letters to Justice Oliver Wendell Holmes[1] which, after a quarter of a century, still has impelling force: "It is good for current doctrine to be vigorously winnowed now and again." The doctrine of the Wagner Act is upon the threshing floor receiving a winnowing process vigorous enough to leave the wheat and toss to the winds chaff which may have adhered from the pressure of conflicting interests.

That conflicting interests exist was pointed out by President Roosevelt in an "off-the-record" press conference held nearly three years ago. If he is correctly quoted in an editorial appearing in the New York Times, long after the event, the President of the United States, on April 21, 1938, said:[2]

> The Wagner Act ought to have various amendments made to it, but we are a funny people over here. We at once go to the extremes, both on the side of labor and on the side of the employer. . . . Now in England when they put social legislation on the statute books they do it with the knowledge that every year or so they will amend it. . . . Now how do they amend it? They have a Royal Commission that looks it over. The commission is non-partisan, there are business men on it, and there are labor people on it. . . . Now the machinery (of the Wagner Act) . . . needs improving, of course it does, but do it in the English way.

The American equivalent of a Royal Commission was carefully prepared and in due season the Attorney General's Committee on Administrative Procedure was appointed, the labors of which were facilitated through the preparation of a series of monographs and factual studies of the various federal administrative agencies, including the National Labor Relations Board.

The winnowing process to which the National Labor Relations Act has been subjected may be observed in the pages of textbooks and legal periodicals,[3] and, particularly in the proceedings of the American Bar Association since 1936, when the decision was reached in Boston that the Association should "give its experienced and disinterested consideration to the human problems arising in the field of employer-employee relations."[4]

Dispassionate studies made by many persons and the annual reports issued by the National Labor Relations Board alike point to the usefulness of the concept of collective bargaining as a procedure for overcoming the "inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association."[5]

I

Certain postulates may be made in regard to which there seems to be general agreement. These can be briefly stated before inviting attention to the half dozen fundamental concepts which may require more detailed consideration:

(1) The national interests are furthered by a wide recognition of the right of workers to make collective bargains, through representatives of their choice, as to hours of labor, wages, and other terms and conditions of their employment.

(2) It is clearly desirable that the principle of collective bargaining and the complete freedom of employees to select their own representatives should be recognized and enforced as a matter of national public policy and extended, so far as the Constitution permits, to all private employers, thereby giving them similar advantages and disadvantages in the competitive business world.

(3) It is desirable that these rights, so far as the Constitution allows, should be safeguarded by federal statutes, federal administrative agencies and federal courts.

(4) The National Labor Relations Board is accomplishing most of its objectives, and should be retained as an administrative body of demonstrated usefulness.

Some of the concepts embodied in the National Labor Relations law find strong support in the American way of life, notably, the freedom assured workers of choosing their own representatives for collective bargaining and the protection afforded them against unfair labor practices. Analogies and precedents are to be found in statutes regulating elections of public officials and in prohibiting corrupt practices which might jeopardize the integrity of the ballot box.

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*Another of the 1942 Ross Essays.

1. *Holmes-Pollock Letters*, Vol. I, pages 233, 234. Letter of Pollock dated "March 1916."

2. Editorial, N. Y. Times, Dec. 2, 1941: "We Are A Funny People."

3. Many important books, pamphlets and law review articles are cited in the opinions by Judge Clark of the Third Circuit Court of Appeals in the two cases of *Titan Metal Mfg. Co. v. NLRB*, 106 Fed. (2d) 254, 256, and *NLRB v. Botany Worsted Mills*, 106 Fed. (2d) 263, 267, (July 20 and Aug. 3, 1939).

4. The activities of the American Bar Association are summarized in "The Association's Recommendations as to Labor Legislation," 28 A.B.A.J. 172 (March, 1942). The quotation is from this article.

5. Section 1 of the National Labor Relations Act, July 5, 1935, c. 572; 49 Stat. 449, 29 U.S.C.A., Sec. 151 to 166.

Another fundamental principle of democracy, that of equal opportunity to all, based as it is on the belief that all persons are born free and equal, appears to run counter to the concept of a closed shop, the continued existence of which is recognized by the Wagner Act.[6]

While the constitutional right to freedom of speech is one which is subject to well established limitations, the Wagner Act, as interpreted by some of the circuit courts of appeal, seems to impinge upon the full freedom of employers to discuss dispassionately current labor questions. The reality of the danger that comments of employers and their supervisory employees may be deemed an interference with the freedom granted to employees in selecting their representatives, has been demonstrated in many decisions of the Board and of the courts.

Other sections of the Wagner Act are difficult to reconcile with the ingrained belief that equality is equity; for the statute imposes a duty of collective bargaining on employers without asserting any corresponding obligation on workers.

The main portion of this essay is devoted to a consideration of the validity of some of the fundamental concepts of the National Labor Relations Act when viewed in the light of the American modes of thought. Half a dozen changes in the statute are suggested as desirable steps for enhancing the usefulness of the procedure of collective bargaining and for establishing on a clearer foundation the respective rights and duties of employers and employees who may be subject to its provisions. One or two additional suggestions will also be made as to other problems in the field of federal labor relations law.

II

The unilateral character of the statutory duty of collective bargaining was stated by the present Chief Justice in *National Labor Relations Board v. Columbian Enameling & Stamping Co.*[7]

> While the Act thus makes it the employer's duty to bargain with his employees, and failure to perform that duty entails serious consequences to him, it imposes no like duty on his employees.

Even if the employees break a labor contract the statutory duty of collective bargaining imposed on the employer remains in full force.[8] If the union desires to bargain collectively notwithstanding previous delinquencies, the respondent may not refuse.[9] The right which workers possess of collective bargaining is a continuing one and negotiations for renewal or for the modification of an existing contract may be undertaken, according to the opinion of the Circuit Court of Appeals for the Third Circuit, shortly after the signing of the preceding contract.[10]

The concept of inequality, therefore, underlies the Wagner Act. As pointed out by Professor Max Radin, such inequality does not necessarily connote injustice. In his essay entitled *My Philosophy of the Law*, this student of basic principles states:[11]

> Against this concept of justice as fundamental equality, there is an equally fundamental aspect of justice in which it is not equality at all, but in which it is, on the contrary, inequality.

Perhaps the time has come to evaluate anew the reasons for the negation in the National Labor Relations Act of the ancient view that "That which is sauce for the goose should be sauce for the gander."

A reappraisement of the relative strength and weakness of the power of employees is found in the opinion in the Fourth Circuit in the *du Pont* case:[12]

> We see today a mobile labor force, strengthened by statutory safeguards, working on comparatively even terms with the employer, who may often owe his particular strength to a superior economic, educational and social position. Under this view of the modern industrial situation, we surely cannot indulge in any assumption of weakness on the part of the employee; . . .

The objective of industrial peace would be furthered by general acceptance by the Board and the courts of the principle that labor contracts, when lawfully made, should not only be legally binding on both parties, but that breach of the contract on the part of the employee should be given consequences corresponding in importance with those which pursue an employer who has broken such contract.

To accomplish this goal it should not be necessary to formulate any code of fair practices fixing standards of conduct for workers, or to impose on them a duty of collective bargaining.

The principle of estoppel has already been recognized by the Circuit Court of Appeals for the Seventh Circuit in *National Labor Relations Board v. Columbian Enameling & Stamping Co.*[13]

> They are estopped to say that their violation of their specific agreement not to strike may be by them ignored and repudiated.

The United States Supreme Court has noted that the jurisdiction to review orders of the Board "is vested in a court with equitable powers."[14] The present suggestion merely involves complete recognition of the principle that, if a particular order would be inequitable if requested by the workers in a private action against the employers, it should be deemed inequitable although the proceeding is brought by the Board to enforce a public right.

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6. Section 8 (3).
7. 306 U. S. 292, 297, 83 L. Ed. 660, 664 (Feb. 27, 1939).
8. *NLRB v. Highland Shoe Co.*, 119 Fed. (2d) 218, 222, C.C.A. 1, (April 15, 1941).
9. *NLRB v. Reed & Prince Mfg. Co.*, 118 Fed. (2d) 874, 885, C.C.A. 1, (April 2, 1941).
10. *NLRB v. Newark Morning Ledger Co.*, 120 Fed. (2d) 262, 267, (April 17, 1941).
11. *My Philosophy of the Law; Credos of Sixteen American Scholars*, Page 287, 301 (1941).
12. *E. I. du Pont de Nemours & Co. v. NLRB*, 116 Fed. (2d) 388, 398, (Dec. 27, 1940).
13. 96 Fed. (2d) 948, 953 (April 28, 1938). Affirmed in 306 U. S. 292, 83 L. Ed. 660, (Feb. 27, 1939).
14. *Ford Motor Co. v. NLRB*, 305 U. S. 364, 373, 83 L. Ed. 221, 229, (Jan. 3, 1939).

Keeping in mind the objective of industrial peace, the following changes in the National Labor Relations law are recommended as desirable and as tending to improve the balance of rights and duties of employers and employees:

(a) Upon breach on the part of workers, or an organization of workers, of the provisions of a labor contract, lawfully made, the Board should be directed by statute to apply equitable principles in molding its orders in proceedings upon charges or complaints filed with it by or in behalf of the workers or an organization of workers.

(b) The Act should be amended so that, in proceedings before the Board or proceedings brought by the Board in the appropriate court for an order of enforcement, any defense which would have been available in equity if the workers or organization of workers in whose behalf the Board is acting, had in fact been the real plaintiffs, shall be available to the respondent in such proceedings.

III

One of the basic principles of the Wagner Act is that it is an unfair practice for an employer "to dominate or interfere with the formation or administration of any labor organization."[15] Obviously, such forbidden interference might be effected by word as well as deed.

This concept is confronted by another which is found in the First Amendment, that Congress shall make no law abridging the freedom of speech. The broad scope of this principle has been clearly stated by Mr. Justice Frankfurter in *American Federation of Labor v. Swing*.[16]

> The right of free communication cannot therefore be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ.

There can be no question but that, as pointed out in *Continental Box Co. v. National Labor Relations Board*,[17] the right of free speech "is just as clearly a right of employers as of employees."

In harmony with this view is the eloquent statement of Judge Sibley in *Humble Oil & Refining Co. v. National Labor Relations Board*:[18]

> We do not think that the law, any more than common sense, would require the employer to stand as a sheep before his shearers dumb, not opening his mouth.

But the freedom of speech by an employer may prove illusory if the opinion of Judge Jones of the Third Circuit, in *National Labor Relations Board v. New Era Die Co.*, is sound:[19]

> The fact that expression is free does not mean that the utterer may not be called upon to answer for it by way of being held accountable for the effect of his expressions. The evidentiary value of the utterance, when competent and material, is ever present. Coercion may be thus established, if the proof be sufficient and although the proof may result from one's exercise of his right to speak freely.

The Circuit Court of Appeals for the Second Circuit in *National Labor Relations Board v. Federbush Co.*,[20] followed the viewpoint of the Third Circuit:

> Arguments by an employer directed to his employees have such an ambivalent character; they are legitimate enough as such, and *pro tanto* the privilege of "free speech" protects them; but so far as they also disclose his wishes, as they generally do, they have a force independent of persuasion. The Board is vested with power to measure these two factors against each other, a power whose exercise does not trench upon the First Amendment.

Judge Learned Hand, in his opinion in the foregoing case, discerns the reality of the conflict between the right of an employer to enjoy, under customary limitations, freedom of speech, and the need of protecting workers in their freedom of organization. He concludes his discussion by stating: "The Board must decide how far the second aspect obliterates the first."

It seems desirable to amend the National Labor Relations law in such a way that a formula will be furnished for the guidance of the Board in the exercise of its discretion and for the information of employers who may have occasion to state dispassionately their viewpoint on labor situations which directly affect the operation of their business.

The obliteration of a constitutional right should not be placed in the hands of an administrative board in the absence of a statute which, in clear terms, defines the circumstances under which such board may exercise its discretion.

IV

A footnote to the opinion of Mr. Justice, now Chief Justice, Stone, in *American Federation of Labor v. National Labor Relations Board*, indicates that Congress, in enacting the Wagner Act, probably recognized that representation proceedings might involve rival unions.[21]

The Circuit Court of Appeals for the Seventh Circuit, in *A. G. M. Worker's Assn. v. National Labor Relations Board*, vividly portrays the embarrassment of an employer when confronted by claims of competing unions:[22]

> It is true this leaves the petitioner in a most unfortunate and unhappy position. He is by order of the Board, denied the right to a hearing, on whether his union is the choice of the employees as their bargaining agent. Yet he is bound by a decision in a case to which he is not a party, and to which he was denied leave to intervene.

The concept of the Wagner Act is that the employer, at his peril, must bargain with the union which in fact is the real representative of a majority of the workers. Rival unions may present conflicting demands. Nor will a mere count of noses, if this were possible, resolve his doubt, for the Board may, in its discretion, include employees of other concerns with his employees as constituting a single appropriate unit for choosing representatives.

It is not necessary to confer on the employer the

15. Sec. 8 (2).
16. 312 U. S. 321, 326, 85 L. Ed. 855, 857.
17. 113 Fed. (2d) 93, 97, C.C.A. 5 (June 27, 1940).
18. 113 Fed. (2d) 85, 89, C.C.A. 5 (June 24, 1940).
19. 118 Fed. (2d) 500, 505 (Feb. 25, 1941).
20. 121 Fed. (2d) 954, 957 (July 18, 1941).
21. 308 U. S. 401, 411, 84 L. Ed. 347, 353. Footnote 4.
22. 117 Fed. (2d) 209, 210 (Dec. 20, 1940).

privilege of participating actively in the controversy between the unions. Indeed this would be most undesirable. The doe always stands aside when rival bucks lock horns. Although he is an interested spectator, the employer, as a non-belligerent, still has rights which should be safeguarded by the Board and the courts. This concept of justice found its early beginning in the common law and later developed into established chancery procedure whereby a stakeholder could bring a bill of interpleader. In recent years the federal courts have been empowered to entertain interpleader proceedings.[23]

There would be no impairment of the principles of the National Labor Relations law if an amendment should be made adapting and making applicable the interpleader rules.

The employer, willing to bargain collectively with the accredited representative of his employees, and reasonably unable to decide between two rival unions, stands in need of a remedy in the nature of equitable interpleader. This need may be met by an appropriate Act of Congress.

The following changes in the statutory law are submitted as desirable:

An employer who has received requests or demands for collective bargaining by two or more rival unions or organized groups of workers, should be empowered by statute to file with the National Labor Relations Board a petition for the determination by the Board of the union or group of workers which it will then certify as chosen representatives for the purposes of collective bargaining. The Board should be authorized pending the conclusion of such interpleading proceedings to issue its order to protect the employer from picketing by or on behalf of such competing unions or organized groups of workers.

V

The National Labor Relations Board has been subjected to much unmerited criticism. One example may suffice. The Circuit Court of Appeals for the Third Circuit, in *Berkshire Employees Assn. v. National Labor Relations Board,* explained:[24]

> This administrative body must at times be successively or simultaneously investigator, complainant, prosecutor, trier of facts, declarer of law and administrator, all in the same matter. To it is entrusted responsibility for carrying out the policies of the National Labor Relations Act to further the public interest. Whether it is wise public policy to handle certain governmental functions through such an agency is a problem for the legislative body and not for the courts.

It seems unwise to attempt the division of the functions of the Board even to the limited extent of vesting appointment of its examiners in some other agency or branch of the government.

There is, however, one way in which, by a modification of procedure, grounds may be cleared for a greater public appreciation of the impartiality of the Board and its agents. This relates to the issuance of subpoenas.

Section 21 of Article Two of the Board's Rules and Regulations provides that applications for subpoenas "shall specify the name of the witness and the nature of the facts to be proved."

This provision has been criticized, notably by Associate Justice Stephens in his dissenting opinion in the *Bethlehem Steel Company* case:[25]

> Moreover the requirement that subpoenas should state the nature of the facts to be proved was applied unilaterally, that is, against the petitioners, and not in respect to subpoenas issued at the Board itself.
>
> The right of every citizen in both civil and criminal cases to have compulsory process for the attendance of witnesses is an essential feature of the Anglo-American legal system. . . . For the Board thus to obtain advance knowledge of the case of a party on trial before the Board, when the party can have no advance knowledge of the Board's case, is contrary to elementary principle of fair play. Under the National Labor Relations Act the Board is not only judge, it is also party and prosecutor.

A similar objection had been made and sustained by the Circuit Court of Appeals for the Seventh Circuit, in *Inland Steel Co. v. National Labor Relations Board,*[26] the court deeming this rule to be "an unreasonable and unfair restriction upon petitioner's right to the process of subpoena."

On the other hand this rule has been upheld as reasonable, particularly as a means of curbing abuses which might result from wholesale issuance of subpoenas. The refusal to grant a blanket request of the employer was sustained in *National Labor Relations Board v. Dahlstrom Metallic Door Co.*[27]

When two viewpoints are in conflict, and the desire of the Board to prevent abuses of its subpoenas is in juxtaposition with the traditional right of a litigant to have compulsory process without prior disclosure of contemplated testimony, the scales should incline towards the larger freedom, especially when other means are at hand to curb improper use of subpoenas.

Any member of the bar who abuses his discretion in using compulsory process is promptly amenable to discipline.

The suggestion, therefore, is made that reliance should be placed in the fairness of lawyers, and that the rule in reference to subpoenas should be changed so as to direct their issuance in proceedings before the Board or its examiners, upon the written request of members of the bar.

VI

Each of the four recommendations already presented, if carried into effect, would enlarge the rights of em-

23. Act Jan. 30, 1936. 40 Stat. 1096, C. 13, 28, U.S.C.A. Sec. 41 (26) Supplement.
24. 121, Fed. (2d) 235, 238 (June 19, 1941).
25. *Beth. Steel Co. v. NLRB,* 120 Fed. (2d) 641, 659, 660 (May 12, 1941).
26. 109 Fed. (2d) 9, 20 (Jan. 9, 1940).
27. 112 Fed. (2d) 756, 758, C.C.A. 2, (June 17, 1940). Followed in *NLRB v. Blackstone Mfg. Co.,* 123 Fed. (2d) 633, 634, C.C.A. 2, (Nov. 17, 1941).

ployers. These may be balanced by three additional suggestions tending to increase the statutory privileges of workers. Additional rights of court review, it is believed, should be granted to unions or organized groups of workers in representation proceedings. Means should be developed for making audible the wishes of minorities who may have been outvoted in the selection of representatives for collective bargaining. Finally, a door should be opened whereby competent prospective employees may "join the union" when such step is desired by reason of the existence of a closed shop.

Each of these proposed changes in the Wagner Act involve real or apparent conflicts between its basic principles and other recognized modes of American thought and practice.

The National Labor Relations Act makes a sharp distinction between orders of the Board as to unfair practices, which are subject to direct review by the courts, and the certifications of representatives for collective bargaining which may not be reviewed directly by the circuit courts of appeals, but may be reexamined and tested for abuse of discretion on the part of the Board only when the courts are reviewing orders restraining unfair practices in proceedings which embody a record of such certification of representatives.[28]

If the employer's conduct is not called in question, the certificate of the National Labor Relations Board in representation proceedings is final and not subject to court review.

In the *Consolidated Edison Company* case[29] the United States Supreme Court recognized that an independent union having beneficial interests in contracts, the fate of which was bound up in proceedings before the Board involving unfair labor practices, was entitled to "notice and hearing before they could be set aside." In the language of Chief Justice Hughes such a right rested upon "the plainest principle of justice." But, said the Supreme Court in the later case of *Pittsburgh Plate Glass Co. v. National Labor Relations Board*:[30] "As the order does not run against Union, [an independent group, the recognition of which had been withdrawn] its presence was unnecessary." The following significant language then described the status of the independent group:

> After such an order the employer may not be compelled by any other agency of the government to perform any acts inconsistent with that order. While it leaves the Union's private rights untouched, this order does forbid further dealings by the Company with the Union as labor representative of the employees.

The union or group of employees, recognition of which has been withdrawn by the Board, clearly is not an outlaw. It may sue for and assert its private rights. But an injunction has in effect been issued preventing the employer, during the period of the ban, from recognizing such group as representing its employees.

The foregoing cases clearly define the practical effect of certification by the Board in any representation proceedings. The union or group which failed of certification, although it may have polled forty-nine percent of the ballots in an election conducted by the Board, as well as a union disqualified because it was dominated by the employer, has no standing to obtain a judicial review of the certification in the absence of any misconduct or unfair labor practice on the part of the employer.

Since the disqualified or outvoted union or group of workers has not been outlawed and no death sentence has been pronounced, an amendment of the Wagner Act is desirable so as to permit it to petition for, and directly obtain, a judicial review of the certification. It should be allowed to enter the court room on its own feet, and not be compelled to await a chance ride on the shoulders of the employer. The Board may have erred or abused its discretionary powers. The provisions of the National Labor Relations law, when tested by basic considerations of justice, here disclose a need for modification whereby parties in interest may directly obtain a court review of the Board's certification of representatives for collective bargaining.

VII

The National Labor Relations Board under the Wagner Act has been given discretion to determine the appropriate unit within which workers may choose their representatives for collective bargaining. It may select "the employer unit, craft unit, plant unit or subdivision thereof."[31] The courts do not have power to review such selection except as an incident to proceedings to enforce or set aside an order of the Board upon complaint of unfair labor practices.[32]

Almost half of the new cases received by the Board during the year covered by its most recent annual report have been representation proceedings.[33] While some of these proceedings doubtless also involve charges of unfair trade practices, it is manifest that in a very large number of cases the exercise of discretion by the Board stands without review in its selection of the appropriate unit within which workers are to choose their representatives for collective bargaining.

The voting unit is the cornerstone of the structure upon which the doctrine of collective bargaining rests. Even against their wishes the employees of a particular plant may be included in a larger grouping with those of other plants located, perhaps, some hundreds of

28. *Am. Fed. of Labor v. NLRB*, 308 U. S. 401, 409, 84 L. Ed. 347, 352. Accord: *Pitts. Plate Glass Co. v. NLRB*, 313 U. S. 146, 154, 85 L. Ed. 1251, 1259.

29. *Consolidated Edison Co. v. NLRB*, 305 U. S. 197, 233, 83 L. Ed. 126, 142.

30. 313 U. S. 146, 155, 85 L. Ed. 1251, 1260.

31. Section 9 (b).

32. *Am. Fed. of Lab. v. NLRB*, 308 U. S. 401, 405, 84 L. Ed. 347, 350.

33. Sixth for year ending June 30, 1941, Page 11. Actual percentage stated 47 percent.

34. 113 Fed. (2d) 698, 702. (July 23, 1940). *Affirmed:* 313, U. S. 146, 85 L. Ed. 1251.

miles away. Such a situation occurred and is described in *Pittsburgh Plate Glass Co. v. National Labor Relations Board*. The Circuit Court of Appeals for the Eighth Circuit said:[34]

> It seems unfortunate that the employees of the Crystal City plant should be forced to accept a representative for collective bargaining not of their own choosing, but that situation is not an unusual situation with minorities. The fact that it was the wish of the vast majority of the employees at the Crystal City Plant to have that plant treated as a separate unit for the purpose of collective bargaining was presented to the Board and considered by it.

The United States Supreme Court sustained the action of the Board in selecting, as the appropriate unit for collective bargaining, all of the production and maintenance employees of the six plants of the same employer.

The extent of the discretionary power of the Board in guiding the development of the labor movement in this country is difficult to measure in precise terms. Even an unconscious predilection for larger rather than smaller unions, or for craft instead of company groups, may affect the dispassionate decisions of the Board.

These considerations reinforce the suggestions already made that any group of workers, the conditions of employment of which are different in a reasonable or material degree from those of other employees, should be empowered to petition the National Labor Relations Board for a certification that they form a voting unit, and the Board, upon being satisfied as to the facts, should, by statute, be empowered to issue its certification establishing such recognition. From the action of the Board in granting or refusing certification, any party in interest should be given the right to petition the court for review, and the court, after hearing should have the power to determine whether the Board had complied with the statute or had abused its discretion, and to affirm or remand accordingly.

The analogy between the selection of voting units under the Wagner Act and the formulation of boundaries of districts for the election of public officials, is not close. Yet we may remember that, on one famous occasion, Governor Gerry demonstrated his skill in drawing the lines of political districts and thereby enriched the English language when a proposed voting unit took on the form of a salamander and became the first authentic Gerrymander.

VIII

One important provision of the National Labor Relations law embodies recognition of the principle of the closed shop.[35] The statute is not to "preclude any employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein, if such labor organization is the representative of the employees, . . ."

The American Law Institute in its fourth volume of the *Restatement of the Law of Torts* devotes a chapter to labor disputes, and in the comment on section 788, recognizes that the establishment of a closed shop is a proper object of concerted action by employees, subject however to the following limitation:[36]

> When a demand for restriction does not involve either securing of work for union employees or the maintenance or increase of union membership, subject to reasonable regulation by the union, but is directed towards the establishment of a monopoly privilege in a group of present employees of the union, to the exclusion of everyone else, it is not a demand within the rule stated in this Section, whether or not it is otherwise proper.

The Institute, therefore, envisages the possible conflict between the American principle which discourages monopolies and the concept that closed shop agreements should be deemed valid. The position taken by those who have drafted the *Restatement of the Law of Torts* seems impregnable.

It is accordingly suggested that jurisdiction should be conferred upon the Board to determine, on the petition of any party in interest, the validity of particular shop agreements, and that the National Labor Relations law should be amended so as to incorporate therein the principle voiced by the American Law Institute in its comment already quoted.

The effect of such a change in the federal labor relations law would be to assure to competent workers, who may not be members of the union which has been chosen as the agency for collective bargaining, an opportunity of meeting reasonable conditions imposed upon its members, and thereby obtaining employment.

IX

While concentrating attention upon changes which may be desirable in the National Labor Relations law it should not be forgotten that this is but one of half a dozen acts of Congress which together present a composite system of federal labor relations statutes.[37] Two of these measures, the Norris-La Guardia Act of March 23, 1932 and the Fair Labor Standards Act of June 25, 1938, which respectively were placed on the statute books three years before and three years after the Wagner Act of July 5, 1935, invite brief comment.

The Norris-La Guardia Act sharply restricted the jurisdiction of the federal courts in the issuance of injunctions "in any case involving or growing out of any labor dispute." Among the conditions which must be found to be present after hearing in open court is one reading: "That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection."[38]

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35. Section 8 (3).

36. *Restatement of Torts*, Sec. 788, Comment (c).

37. Teller, in his third volume of *Labor Disputes and Collective Bargaining*, reprints the labor provisions of the following laws: Sherman Act, at page 1750; Clayton Act, at page 1752; Railway Labor Act, page 1754; Norris-La Guardia Act, page 1778; National Labor Relations Act, page 1784; Walsh-Healey Act, page 1810; and Fair Labor Standards Act of 1938, page 1915.

38. Section 7 (e).

To use the happy terminology of Mr. Justice Frankfurter,[39] a federal chancellor's decree is available only when no reliance can be placed on the policeman's club.

This federal anti-injunction statute, therefore, invokes primary reliance on the state or local police system, which must be arraigned for unwillingness or inability to carry on its traditional function of protecting property from unlawful damage before the federal courts will take action. True, the chancellor's writ traditionally is stayed when there is an adequate remedy at law. But the Norris-La Guardia Act revives a medieval concept as to the importance of hue and cry and hot pursuit after evil doers.

The federal system of labor law regulations should, it is believed, be established on its own separate foundations and the jurisdiction of the courts of the United States should not depend on the strength or weakness of the local police in a thousand and one communities.

The suggestion is made that it is desirable to amend the Norris-La Guardia Act by deleting clause (c) of Section 7, already quoted.

It is sound policy for the federal government to rely on the process of its own courts without invoking a preliminary examination of the stoutness of the state or local policeman's clubs.

Turning now to the Fair Labor Standards Act of 1938 it is interesting to observe that section 7(b) makes reference to the National Labor Relations Board and confers power upon it, upon petition of a labor union, to issue a certificate that such union is "bona fide." The procedure whereby a labor union may attain such status independently of its certification as the agency chosen to represent workers in collective bargaining,[40] provides an additional concept of importance.

This principle, that organized groups of workers may be adjudged by the Board to constitute "bona fide labor unions" indicates the possibility that definite privileges could properly be conferred upon such unions in analogy with the rights and privileges granted to English trade unions, which voluntarily register under the Trade Union Act of 1871.[41]

It is suggested that the National Labor Relations Act should be amended so as to permit labor unions voluntarily to become listed and certified by the Board as bona fide and that definite consequences should follow, such as the right to a particular name, the right to sue and be sued, and the right to hold property through designated trustees.

Such voluntary certification would be a convenient substitute for incorporation and should facilitate the further development of federal labor relations laws.

X

The time has come to gather up the threads of discussion and observe the pattern which may be developing.

The Wagner Act has been considered from the viewpoint of the employees. The suggestion has been made that a possible solution of the minorities problem should be tried by permitting any group of employees, which logically comprise an easily distinguished unit, to petition the Board for recognition as the appropriate unit for choosing representatives for collective bargaining. Danger lest a closed shop, recognized by the existing law, should be made a means of monopoly, has led to the recommendation that non-members who are competent, should under proper safeguards, be allowed to join the union.

On the other hand several changes which seem to favor the employer have been presented as desirable. Without swinging the pendulum so far as to grant full equality in rights and duties between employers and employees, it has been urged that the principle of estoppel should, to a greater degree, be recognized by the Board in molding the content of its orders against employers.

A greater freedom of dispassionate expression of views by employers in labor controversies has been presented as a proper recognition of a right embodied in the First Amendment. As a means of escape from being mauled in a quarrel between two labor unions, a method has been suggested whereby an employer may be allowed to invoke the principle of the federal interpleader statute.

These half dozen recommendations have been selected as touching the fundamental concepts of the National Labor Relations law, matters which may seem to require statutory changes whenever Congress may again have leisure to consider post war problems.

The only change suggested in the Rules of the National Labor Relations Board related to the issuance of subpoenas and the reliance which may be placed on the fairness of members of the bar not to abuse process entrusted to them.

Finally, one change was suggested as to the Norris-La Guardia Act, and it was recommended that the federal courts, in proceedings involving labor disputes, should no longer be required to determine the efficiency of the local police in protecting property.

Looking to the future, the usefulness of the concept of "bona fide labor unions," a phrase first found in the Fair Labor Standards Act of 1938, was noted and the possibility was observed that the voluntary certification of such status could be accompanied by consequences analogous to those granted by the English Trade Union Act of 1871, in the event of voluntary registration of trade unions.

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39. *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U. S. 287, 295, 85 L. Ed. 836, 842.

40. Revised Interpretative Bulletin No. 8 issued under the Federal Wage and Hour Law, deals with collective bargaining agreements. Reprinted in 3 Teller, page 84 of Supplement.

41. The English system of registration is discussed at page 54, etc. of *Report of the Commission on Industrial Relations in Great Britain*, issued by the U. S. Dept of Labor 1938.

MECHANICS OF APPELLATE DECISION—IOWA

By HON. FREDERIC M. MILLER

Supreme Court, State of Iowa

THE consideration of cases and the rendering of decisions by appellate courts have received much attention in recent years from those who are concerned with the general problem of improving the administration of justice. In much of this discussion, the approach has been made from abstract generalities. It is proposed herein to provide an approach from concrete, specific experience, based upon decisions in cases presented to the Supreme Court of Iowa during the three-year period, 1939-1941, inclusive. Such experience is not offered as a model for any particular reform but solely as a concrete illustration of the realities with which we are faced.

The general impression that laymen have concerning the decision of a case by an appellate court is that every member of the court reviews the entire record in each case, carefully considers all of the briefs, investigates the questions raised and participates in the decision of the case to such extent that the litigants receive the benefit of the combined judgment of all members of the court on every detail connected with the decision of the case. Ordinarily, this is impossible. As opposed to the blind faith of laymen, many lawyers entertain the fear that, in the decision of a case on appeal, the result is largely the view of one man, the judge who writes the opinion, and the participation of the other members of the court is usually perfunctory. Ordinarily, such fear is unfounded.

The best procedure so far developed exists where but few cases appear on the docket for decision. With such a docket, this is possible: Every member of the court reads the record and briefs before submission and hears the oral argument; each judge prepares a memorandum on the case, stating the facts involved, the questions presented for decision, and his suggestion on the decision of each question; a conference is held, the memoranda are discussed, a decision is reached and one judge then prepares the opinion of the court so developed. Where such procedure is possible, the view of laymen, above stated, is substantially correct. But such procedure is not always possible. It is clearly impossible in Iowa.

The Iowa court meets once each month (except July and August) for the submission of cases. During September, October and November, 1940, there were 120 cases submitted for decision. The records and briefs alone comprised 28,374 pages of printed matter. It is physically impossible for the court to function in accord with the perfect procedure outlined above. The stark realities require some modification. However, this arrangement has been developed: One judge reviews the records and briefs in all cases for submission and prepares memoranda thereon, stating as to each case the nature of the action and the defense, the decision below and the nature of the questions presented by the appeal; the memoranda are distributed to every member of the court before the submissions occur; each judge has a concrete outline of each case before him as the oral arguments are had. This has made the submission of cases more effective.

The court has nine judges and sits in two divisions. The chief justice sits with each division. The other eight judges are divided into divisions of four, so that, with the chief justice, each division consists of five judges. The work is equalized as far as practical. To be concrete, in the months of September, October and November, 1940, of the 120 cases then submitted, 56 cases, involving 15,828 pages of printed matter, were submitted to the first division and 64 cases, involving 12,546 pages, were submitted to the second division. Only the division to which a case is submitted hears the oral argument. Arguments are limited to thirty minutes to open, thirty minutes to answer and fifteen minutes to reply. After the submission, an informal conference is had which necessarily is limited to first impressions. The record and briefs in each case are assigned to a single judge for examination and for the preparation of an opinion. When the opinion is prepared, copies are sent to all members of the court—that is, to both divisions. All judges vote on it. Five concurrences are necessary for the filing of an opinion.

When the division meets the following month, a conference is had in advance of the oral submissions. The opinions then written are discussed and those having the required concurrences are filed. Judges of the other division can and do sit in at the conference. One of the conferences each month usually has present at least eight if not all nine judges. If a dispute arises and the judge to whom the case was originally assigned cannot get sufficient concurrences, the case is reassigned to another judge for the preparation of a new opinion. Often the case so reassigned is eventually decided by an opinion written by a judge from the division that did not hear the oral argument. This arises because the judge who disagrees with an opinion has secured the record and briefs and has done considerable work in opposition to the proposed opinion. It is more practical to reassign the case to him.

Although all nine judges receive all proposed opinions and are expected to vote upon them, for various reasons opinions are filed with less than nine judges voting on them. However, the minimum of five is unusual. To illustrate, in 1939 and 1940, there was a total of 698 opinions filed with the vote as follows: 194 were 9 to 0; 188 were 8 to 0; 134 were 7 to 0; 81 were 6 to 0; 22 were 5 to 0; 79 were by a divided court of which only 7 were decided 5 to 4. Allocating those cases where the court was divided, in 32% of the cases all nine judges participated in the final vote; in 62% at least eight voted; in 84% at least seven voted; in but 16% did only six vote; in only 3% was there the minimum of five voting; in 11% the court was divided, but in only 1% did it divide 5 to 4.

The foregoing is not submitted as a basis for any model program. It is merely offered as a concrete illustration of the results reached in an effort to solve a practical problem. The creation of two divisions makes it possible to hear oral arguments in all cases in which counsel desire to be heard. Fifteen years ago the court had in the neighborhood of 900 cases per year. Then the divisions were clearly indispensable. They still appear to be desirable. However, since the decisions of the court determine the law of the state, it is important that the whole court consider each opinion that is written. Hence all opinions are considered and voted upon by all judges without regard to the personnel of the divisions of the court. That was not done when the court undertook to decide 900 cases per year.

The oral arguments are helpful to advise those then sitting concerning the facts of the case, the legal questions presented and the contentions of counsel thereon. The review of the cases in advance of their submission and the circulation of memoranda thereon prior to the oral arguments, make the oral presentation more effective. But such advance review is an arduous task. If any suggestion might be offered, it is that the lawyers could render able assistance in the preparation of such memoranda.

In the courts of California, Connecticut, Michigan and Pennsylvania, the rules require concise statement of the question involved. To be concrete, Section 2 of Rule VIII of the California rules provides in part as follows:

"A statement of the question involved on an appeal in a civil action shall be set forth on the first page of the appellant's opening brief, and without any other matter appearing thereon. The statement shall be in the briefest and most general terms, without names, dates, amounts or particulars of any kind. The statement in its entirety should not exceed twenty lines, must never exceed one page, and must be printed in type at least as large as that used in the main body of the brief. If the respondent does not agree with the appellant's statement, he may frame his own and incorporate it, in like form and content, as the first page of his brief."

A similar rule has been in operation in Pennsylvania for some forty years. The experience there had is reviewed by Hon. Robert von Moschzisker, one of the justices of the Supreme Court of Pennsylvania. See *A Time-Saving Method of Stating in Appellate Briefs the Controlling Questions for Decision,* 34 Yale L. Jour. 287. He submits several illustrative statements.

In the Iowa Court, we have reviewed 322 cases in the last year. In only one case was the memorandum more than one page and that could have been shortened to less than a page. The average has been less than one-third of a page per case.

If the bar were required to conform to a rule such as that from California, above quoted, it would not be nearly so difficult to review the cases and prepare a memorandum on each case in advance of submission. Such a memorandum serves several purposes. It identifies cases with similar questions, cases which involve fact questions, those which involve legal questions and it outlines the nature of the inquiry in each case. It gives the court a clear picture of its agenda and often stimulates advance preparation by the judges before the arguments. It would seem to have possibilities for the improvement of the administration of justice.

Another suggestion might be added. The rules of appellate courts, which undertake to induce counsel to furnish briefs that are clear, concise and well organized, have a definite purpose. Such a brief is very helpful, whereas one that is long, involved and obscure is not a help but a burden. This is true not only as to the judge who undertakes to write the opinion in the case, but even more so as to the judge who is dissatisfied with some portion of a proposed opinion and wants to find out the contentions of counsel on that one question. When a dispute arises, the judges who disagree with a proposed opinion examine the record and briefs. There have been instances in the Iowa court where five or six judges have read the record and briefs in a troublesome case. The time available to examine cases assigned to other judges is relatively small. Each judge, in the statistics above set out, averaged about 40 opinions per year. But he was called upon to vote on about 300 opinions of his colleagues each year. In those instances where doubt arose and the case was well argued, the task was made easier. Also, a case that is well argued will attract scrutiny from more judges than one wherein the briefs are long, involved, obscure and tedious.

In the light of practical experience, the danger of one-judge opinions can be minimized and a more complete review of each case by the entire court facilitated, if the lawyers will make concise statements of the questions presented and prepare their briefs in a style that is clear, concise and well organized. This saves the time of the judges, permits thorough participation in more cases and materially improves the administration of justice.

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Conserving Manpower in the Courts

ONE of the problems posed by war conditions is the conservation of manpower in the courts.

Cases should be tried before material witnesses are called to the colors. Workers in war industries should be kept from their tasks no longer than is absolutely necessary when in attendance as litigants, jurors or witnesses. Jury panels should not absorb an excessive number of veniremen. The convenience of counsel engaged in war work should be considered.

To many of these problems it would seem that there is a simple solution. This is the extension of the use of the pre-trial conference. If properly used, many issues become immaterial and the attendance of witnesses may be dispensed with. Frequently a jury trial is eliminated. Whether a speedy hearing is necessary fully appears in such a conference. Indeed, it is believed that the use of this device will go far towards solving the problem of conserving manpower in the courts during the emergency.

An additional advantage of this plan is that it can be put into operation without either statute or rule of court. All that is required is a judge with vision enough to understand its advantages and persuasive power sufficient to make it effective.

Regional Conferences

SINCE the first of the year over 1500 lawyers have gathered at the six Regional Conferences conducted by the American Bar Association under the auspices of the Section of Bar Organization Activities. The outstanding theme of each meeting was "Mobilizing the Organized Bar in the War Effort."

The fact that the attendance has increased each year since the first conference was held gives proof that these meetings are now an established institution. As many as eight Sections participated in a single meeting. At every meeting, except one which he was prevented from attending by illness, President Armstrong outlined the broad program of the Association. At each meeting representatives of the Committees on War Work, Bill of Rights and Improving the Administration of Justice gave specific plans and suggestions as to just how the organized bar could best be mobilized in the war effort.

No other method has yet been devised by which so many of the valuable activities of the Association can be taken to the lawyers back home. Many members of the Association who have never attended an annual meeting, receive instruction and inspiration. Many lawyers not members of our Association become interested in our common problems.

Not only are we able to help the local lawyers, and others in attendance, but each conference provides a forum in which Section and committee members are afforded an opportunity to present problems which they have encountered and in which they hope for the concerted effort of every organized bar group in the country. In the true conference spirit, opportunity is given for discussion and thereby a solution to the problem is found in the American way.

To what extent, if at all, these conferences can be held in the immediate future is necessarily uncertain because of war conditions and especially the transportation problem. They should not, however, be lost sight of as one of the long range objectives of the Association.

Year by year we learn and after learning, improve our technique. Better organized, better planned and more valuable conferences should ever be our aim. Thus we will be able more effectively to discharge our obligation to the legal profession and the public and justify the existence of our organization.

Lawyers In Defense of Liberty

FROM occupied Belgium comes a tragic story which tells the plight of the people and their lawyers, under a conqueror's measures of oppression under forms of law. In order to regiment the Belgian farmers and their products to serve the purposes of the German State, a Nazi-sponsored National Corporation was set up, to which all farmers were commanded to pay heavy dues or submit to regulations as to turning over their produce.

Hundreds of suits were filed in the Belgian Courts, to challenge the authority of the Nazi corporation. In one community (Louveigne) some 121 peasants are reported to have refused to pay the dues or give up their produce to the Nazis, as ordered by the General Secretary of Agriculture. When brought to Court, Mr. Paul Tscoffen, one of Belgium's outstanding lawyers, boldly undertook their defense. The trial judge, with equal courage, upheld his challenge of the constitutionality and

authority of the Nazi corporation. He held that the Secretary, serving in default of a duly constituted Minister of the Belgian Government, had no legal standing.

Now the word comes that the trials of all these cases have been halted. The two defense lawyers, including Mr. Paul Tscoffen, a former member of the Belgian Cabinet, have been arrested and thrown into jail, for their temerity in resisting the Nazi bureaucracy. Their fate is unknown. Harsh measures are being taken against the recalcitrant farmers. The whole incident is reported to be most disturbing to the German effort to appear as sponsors of law and freedom in Belgium.

From many conquered lands, the meager information which trickles out carries nevertheless the message that lawyers as always are in the forefront in keeping up the fight for freedom and for the preservation of law-governed principles of justice, despite the decrees of invaders.

The Attributes of a Great Judge

ON Monday, March 16, 1942, Attorney General Biddle presented to the Supreme Court of the United States, on behalf of the bar of that Court, a resolution expressing their respectful and affectionate tribute to the memory of Mr. Justice Van Devanter.

The Chief Justice, in his notable response, published in full elsewhere in this issue, speaks of the conviction held by Mr. Justice Van Devanter that "reason would afford the solvent for every problem of judicial cognizance," and that the Supreme Court of the United States was the place for "the final appeal to reason in composing the inevitable conflicts growing out of the distribution by the Constitution of the diverse powers of government." The Chief Justice declared that those who differed with Mr. Justice Van Devanter differed in "their judgment that an instrument of government, intended to endure for ages to come, could not rightly be interpreted as casting a dynamic society in so rigid a mold."

In the final paragraph of his notable response the Chief Justice not only renders high and just tribute to his former associate, but he also sets forth the essential attributes of judicial office. His statement bears repetition here and might well be engraved upon the memory of every judge as a guide to his judicial conduct. The Chief Justice says:

"As we recall the years of association in a common endeavor, the clash of mind with mind in the unending struggle to attain in some measure the ideal of justice under law, there lives in memory this man's devotion and loyalty to a great task, the integrity and sturdy independence with which he wrought. For these are the attributes of the judge, without which there can be no justice. They are the foundation stones of the institution which we serve."

Sustaining Members

OUR Committee on Ways and Means has sent to the membership an informative letter which merits favorable consideration. We deal here with only one aspect of the matter discussed in that letter, namely, the effect of the war on the income of the Association.

Since December 7, 1941, hundreds of our members have left their homes and offices, and entered into military service. The number is fast approaching the thousand mark and will increase in geometric ratio as the need for men increases. The modest figures stated in the letter of the Ways and Means Committee deal only with the present situation, but all of us should recognize that there is more in store for us in the future than that which faces us at the present moment.

The Association has suspended the payment of dues of all members who have entered or may hereafter enter military service. Who is there among us who will not welcome the opportunity to join with many others in paying the modest sum suggested by the Ways and Means Committee so that the Association will not be hampered in its work by loss of income because of those who have gone to war.

It is recognized that not every member of the Association can easily join in this effort. To some the sustaining membership might prove to be too heavy a burden, but no lawyer to whom his profession has been kind and whose professional income removes the burden of financial distress should omit to embrace this opportunity to help lift the load.

The present need is measured not only by the loss of dues from the men in military service. Our present need goes far beyond that. The war has placed upon us burdens which we must carry. We must continue to give all needed counsel and assistance to our lawyer-soldiers by taking care of their business for them so that when they return they shall not have lost their clientage. We must give advice and aid to members of their families. We must make democracy worth fighting for, by improving judicial methods so that justice shall be neither denied nor delayed, that it may be neither sold nor burdened by the heavy costs which heretofore have too often seemed to be equivalent to the sale of justice at an unconscionable price and so that the great influence of our profession may be swiftly and effectually exerted in the service of the nation to expose and refute enemy propaganda and encourage loyal effort.

REVIEW OF RECENT SUPREME COURT DECISIONS

By EDGAR BRONSON TOLMAN*

Taxation—Book Peddlers—Religious Liberty

A municipal ordinance which requires itinerant, non-resident book peddlers to secure a license and exacts a reasonable license fee is a valid exercise of municipal authority and is applicable to book peddlers who sell or distribute religious publications.

Jones v. City of Opelika, 86 Adv. Op. 1174; 62 Sup. Ct. Rep. 1231; U. S. Law Week 4462. (No. 280, 314 and 966, decided June 8, 1942).

The organization known as Jehovah's Witnesses brought to the Supreme Court three cases, one from Alabama, another from Arkansas and the third from Arizona, in which members of that organization had been convicted and fined for distributing books and tracts without procuring the license required by the ordinances of the municipality in which the sales were being made. In each case, members of Jehovah's Witnesses were charged with breaches of the ordinances, convicted after jury trial, the conviction affirmed by the highest court of the state and the case taken to the Supreme Court, two by writ of certiorari and one by direct appeal. The defendants refused to apply for licenses and to pay the license fee or tax, because the books and pamphlets which they were selling contained a discussion of religion, stated the religious views of Jehovah's Witnesses and were sought to be sold and circulated as a religious duty.

The decisions of the state supreme courts were affirmed. The three cases were consolidated and the opinion was delivered by Mr. Justice REED. Opening his discussion of the constitutional problem, Mr. Justice REED says:

> . . . There are ethical principles of greater value to mankind than the guarantees of the Constitution, personal liberties which are beyond the power of government to impair. These principles and liberties belong to the mental and spiritual realm where the judgments and decrees of mundane courts are ineffective to direct the course of man. The rights of which our Constitution speaks have a more earthy quality. They are not absolutes to be exercised independently of other cherished privileges, protected by the same organic instrument. Conflicts in the exercise of rights arise and the conflicting forces seek adjustments in the courts, as do these parties, claiming on the one side the freedom of religion, speech and the press, guaranteed by the Fourteenth Amendment, and on the other the right to employ the sovereign power explictly reserved to the State by the Tenth Amendment to ensure orderly living without which constitutional guarantees of civil liberties would be a mockery. Courts, no more than Constitutions, can intrude into the consciences of men or compel them to believe contrary to their faith or think contrary to their convictions, but courts are competent to adjudge the acts men do under color of a constitutional right, such as that of freedom of speech or of the press or the free exercise of religion and to determine whether the claimed right is limited by other recognized powers, equally precious to mankind. So the mind and spirit of man remain forever free, while his actions rest subject to necessary accommodation to the competing needs of his fellows.

In the application of the fundamental concepts above stated, it is delared that to proscribe the dissemination of doctrines or arguments is to destroy the principal bases of democracy—knowledge and discussion. But it is said that discussion may be limited by the action of the proper legislative body as to times, places and methods for the enlightenment of the community which are not at odds with the preservation of peace and good order. This doctrine, as interpreted by Mr. Justice REED, is as follows:

> This means that the proponents of ideas cannot determine entirely for themselves the time and place and manner for the diffusion of knowledge or for their evangelism, any more than the civil authorities may hamper or suppress the public dissemination of facts and principles by the people. The ordinary requirements of civilized life compel this adjustment of interests. The task of reconcilement is made harder by the tendency to accept as dominant any contention supported by a claim of interference with the practice of religion or the spread of ideas. Believing as this nation has from the first that the freedoms of worship and expression are closely akin to the illimitable privileges of thought itself, any legislation affecting those freedoms is scrutinized to see that the interferences allowed are only those appropriate to the maintenance of a civilized society.

Mr. Justice REED declares that the duty of determining the validity of municipal enactments challenged as unconstitutional, falls upon the courts and that in dealing with these delicate adjustments, the Court "denies any place to administrative censorship of ideas or capricious approval of distributors." Cases dealing with this subject are cited and analyzed.

As to the effect of the selling of religious tracts and books, as compared with their gratuitous circulation, Mr. Justice REED says:

> . . . Casual reflection verifies the suggestion that both teachers and preachers need to receive support for themselves as well as alms and benefactions for charity and the spread of knowledge. But when, as in these cases, the practitioners of these noble callings choose to utilize the vending of their religious books and tracts as a source of funds, the financial aspects of their transactions need not be wholly disregarded. To subject any religious or didactic group to a reasonable fee for their money-making activities does not require a finding that the licensed acts are purely commercial. It is enough that money is earned by the sale of articles. A book agent cannot escape a license requirement by a plea that it is a tax on knowledge. It would hardly be contended that the publication of newspapers is not subject to the usual governmental fiscal exactions, . . .

* * *

*Assisted by JAMES L. HOMIRE and LELAND L. TOLMAN.

When proponents of religious or social theories use the ordinary commercial methods of sales of articles to raise propaganda funds, it is a natural and proper exercise of the power of the state to charge reasonable fees for the privilege of canvassing. Careful as we may and should be to protect the freedoms safeguarded by the Bill of Rights, it is difficult to see in such enactments a shadow of prohibition of the exercise of religion or of abridgement of the freedom of speech or the press. It is prohibition and unjustifiable abridgement which is interdicted, not taxation. Nor do we believe it can be fairly said that because such proper charges may be expanded into unjustifiable abridgements they are therefore invalid on their face.

* * *

If we were to assume, as is here argued, that the licensed activities involve religious rites, a different question would be presented. These are not taxes on free will offerings. But it is because we view these sales as partaking more of commercial than religious or educational transactions that we find the ordinances, as here presented, valid.

In the Opelika case, the ordinance contained a provision that the licenses were revocable, arbitrarily, by the local authorities and it was argued that this circumstance made the Opelika ordinance null and void. As to this, Mr. Justice REED says:

. . . It is urged that since the licenses were revocable, arbitrarily, by the local authorities, . . . there can be no true freedom for petitioners in the dissemination of information because of the censorship upon their actions after the issuance of the license. But there has been neither application for nor revocation of a license. The complaint was bottomed on sales without a license. It was that charge against which petitioner claimed the protection of the Constitution. This issue he had standing to raise. . . . From what has been said previously it follows that the objection to the unconstitutionality of requiring a license fails. There is no occasion, at this time, to pass on the validity of the revocation section, as it does not affect his present defense.

Emphasis had been laid by counsel for Jehovah's Witnesses on the decision in *Lovell v. Griffin*, 303 U. S. 444, where a statute placed the grant of a license within the discretion of the licensing authority, so that the right to obtain the license was made an "empty right and the formality of an application was not a prerequisite to the enjoyment of a constitutional right. In distinguishing that case from the case at bar, Mr. Justice REED says:

. . . Here we have a very different situation. A license is required that may properly be required. The fact that such a license, if it were granted, may subsequently be revoked does not necessarily destroy the licensing ordinance. The hazard of such revocation is much too contingent for us now to declare the licensing provisions to be invalid. *Lovell v. Griffin* has, in effect, held that discretionary control in the general area of free speech is unconstitutional. Therefore, the hazard that the license properly granted would be improperly revoked is far too slight to justify declaring the valid part of the ordinance, which is alone now at issue, also unconstitutional.

The CHIEF JUSTICE filed a dissenting opinion. The grounds for his dissent appear from the following excerpts:

The ordinance in the *Opelika* case should be held invalid on two independent grounds. One is that the annual tax in addition to the 50 cent "issuance fee" which the ordinance imposes is an unconstitutional restriction on those freedoms, for reasons which will presently appear. The other is that the requirement of a license for dissemination of ideas, when as here the license is revocable at will without cause and in the unrestrained discretion of administrative officers, is likewise an unconstitutional restraint on those freedoms.

The sole condition which the Opelika ordinance prescribes for grant of the license is payment of the designated annual tax and issuance fee. The privilege thus purchased, for the period of a year, is forthwith revocable in the unrestrained and unreviewable discretion of the licensing commission without cause and without notice or opportunity for a hearing. The case presents in its baldest form the question whether the freedoms which the Constitution purports to safeguard can be completely subjected to uncontrolled administrative action. Only recently this Court was unanimous in holding void on its face the requirement of a license for the distribution of pamphlets which was to be issued in the sole discretion of a municipal officer. . . .

The CHIEF JUSTICE quoted as follows from *Lovell v. Griffin, supra:* "While this freedom from previous restraint upon publication cannot be regarded as exhausting the guaranty of liberty, the prevention of that restraint was a leading purpose in the adoption of the constitutional provision." Applying this quotation to the case at bar, the CHIEF JUSTICE says:

That purpose cannot rightly be defeated by so transparent a subterfuge as the pronouncement that, while a license may not be required if its award is contingent upon the whim of an administrative officer, it may be if its retention and the enjoyment of the privilege which it purports to give is wholly contingent upon his whim. In either case enjoyment of the freedom is dependent upon the same contingency and the censorship is as effective in one as in the other. Nor is any palliative afforded by the assertion that the defendant's failure to apply for a license deprives him of standing to challenge the ordinance because of its revocation provision, by the terms of which retention of the license and exercise of the privilege may be cut off at any time without cause.

In answer to the point in the prevailing opinion that no application was made for the license, it is declared:

It is of no significance that the defendant did not apply for a license. As this Court has often pointed out, when a licensing statute is on its face a lawful exercise of regulatory power, it will not be assumed that it will be unlawfully administered in advance of an actual denial of application for the license. But here it is the prohibition of publication, save at the uncontrolled will of public officials, which transgresses constitutional limitations and makes the ordinance void on its face.

In further discussion of the effect of the tax and the refusal of Jehovah's Witnesses to pay it, the CHIEF JUSTICE says:

. . . As appears by stipulation or undisputed testimony, the defendants are Jehovah's Witnesses, engaged in spreadding their religious doctrines in conformity to the teachings of St. Matthew, Matt. 10:11-14 and 24:14, by going from city to city, from village to village, and house to house, to proclaim them. After asking and receiving permission from the householder, they play to him phonograph records and tender to him books or pamphlets advocating their religious views. For the latter they ask payment of

a nominal amount, two to five cents for the pamphlets and twenty-five cents for books, as a contribution to the religious cause which they seek to advance. But they distribute the pamphlets, and sometimes the books, gratis when the householder is unwilling or unable to pay for them. The literature is published for such distribution by non-profit charitable corporations organized by Jehovah's Witnesses. The funds collected are used for the support of the religious movement and no one derives a profit from the publication and distribution of the literature. In the *Opelika* case the defendant's activities were confined to distribution of literature and solicitation of funds in the public streets.

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. . . If the distribution of the literature had been carried on by the defendants without solicitation of funds, there plainly would have been no basis, either statutory or constitutional, for levying the tax. It is the collection of funds which has been seized upon to justify the extension, to the defendants' activities, of the tax laid upon business callings. But if we assume, despite our recent decision in *Schneider v. State,* 308 U. S. 147, 163, that the essential character of these activities is in some measure altered by the collection of funds for the support of a religious undertaking, still it seems plain that the operation of the present flat tax is such as to abridge the privileges which the defendants here invoke.

Concluding the dissenting opinion, the CHIEF JUSTICE says:

Freedom of press and religion, explicity guaranteed by the Constitution, must at least be entitled to the same freedom from burdensome taxation which it has been thought that the more general phraseology of the commerce clause has extended to interstate commerce. Whatever doubts may be entertained as to this Court's function to relieve, unaided by Congressional legislation, from burdensome taxation under the commerce clause, see *Gwin, etc. Inc. v. Henneford,* 305 U. S. 434, 441, 446-55; *McCarroll v. Dixie Lines,* 309 U. S. 176, 184-85, it cannot be thought that that function is wanting under the explicit guaranties of freedom of speech, press and religion. In any case the flat license tax can hardly become any the less burdensome or more permissible, when levied on activities within the protection extended by the First and Fourteenth Amendments both to the orderly communication of ideas, educational and religious, to persons willing to receive them, see *Cantwell v. Connecticut, supra,* and to the practice of religion and the solicitation of funds in its support. *Schneider v. State, supra.*

In its potency as a prior restraint on publication the flat license tax falls short only of outright censorship or suppression. The more humble and needy the cause, the more effective is the supression.

Mr. Justice BLACK, Mr. Justice DOUGLAS and Mr. Justice MURPHY, joined in this opinion.

Mr. Justice MURPHY filed a dissenting opinion in which the CHIEF JUSTICE, Mr. Justice BLACK and Mr. Justice DOUGLAS concurred. The dissenting opinion opens with the following paragraph:

When a statute is challenged as impinging on freedom of speech, freedom of the press, or freedom of worship, those historic privileges which are so essential to our political welfare and spiritual progress, it is the duty of this Court to subject such legislation to examination, in the light of the evidence adduced, to determine whether it is so drawn as not to impair the substance of those cherished freedoms in reaching its objective. Ordinances that may operate to restrict the circulation or dissemination of ideas on religious or other subjects should be framed with fastidious care and precise language to avoid undue encroachment on these fundamental liberties. And the protection of the Constitution must be extended to all, not only to those whose views accord with prevailing thought but also to dissident minorities who energetically spread their beliefs. Being satisfied by the evidence that the ordinances in the cases now before us, as construed and applied in the state courts, impose a burden on the circulation and discussion of opinion and information in matters of religion, and therefore violate the petitioners' rights to freedom of speech, freedom of the press, and freedom of worship in contravention of the Fourteenth Amendment, I am obliged to dissent from the opinion of the Court.

The opinion stresses the fact that Jehovah's Witnesses were ordained ministers preaching the gospel, that they were not perpetrating a fraud or demeaning themselves in obnoxious manner and that the literature distributed was not offensive to morals or created any "clear and present danger" to organized society.

The fundamental basis of the doctrine of freedom of speech and freedom of the press are stated and many cases cited and analyzed and on that subject it is said:

Freedom of speech, freedom of the press, and freedom of religion all have a double aspect—freedom of thought and freedom of action. Freedom to think is absolute of its own nature; the most tyrannical government is powerless to control the inward workings of the mind. But even an aggressive mind is of no missionary value unless there is freedom of action, freedom to communicate its message to others by speech and writing. Since in any form of action there is a possibility of collision with the rights of others, there can be no doubt that this freedom to act is not absolute but qualified, being subject to regulation in the public interest which does not unduly infringe the right.

Coming to the subject of freedom of religion, Mr. Justice MURPHY says:

Petitioners were itinerant ministers going through the streets and from house to house in different communities, preaching the gospel by distributing booklets and pamphlets setting forth their views of the Bible and the tenets of their faith. While perhaps not so orthodox as the oral sermon, the use of religious books is an old, recognized and effective mode of worship and means of proselytizing. For this petitioners were taxed. The mind rebels at the thought that a minister of any of the old established churches could be made to pay fees to the community before entering the pulpit. These taxes on petitioners' efforts to preach the "news of the Kingdom" should be struck down because they burden petitioners' right to worship the Deity in their own fashion and to spread the gospel as they understand it. There is here no contention that their manner of worship gives rise to conduct which calls for regulation, and these ordinances are not aimed at any such practices.

A parallel is drawn between the troubles of Jehovah's Witnesses and the struggles of various dissentient groups in American colonies for religious freedom which culminated in the Virginia Statute for Religious Freedom, the Northwest Ordinance of 1787 and the First Amendment. Concluding his dissent, Mr. Justice MURPHY says:

> By applying these occupational taxes to petitioners' noncommercial activities, respondents now tax sincere efforts to spread religious beliefs, and a heavy burden falls upon a new set of itinerant zealots, the Witnesses. That burden should not be allowed to stand, especially if, as the excluded testimony in No. 280 indicates, the accepted clergymen of the town can take to their pulpits and distribute their literature without the impact of taxation. Liberty of conscience is too full of meaning for the individuals in this nation to permit taxation to prohibit or substantially impair the spread of religious ideas, even though they are controversial and run counter to the established notions of a community. If this Court is to err in evaluating claims that freedom of speech, freedom of the press, and freedom of religion have been invaded, far better that it err in being overprotective of these precious rights.

Mr. Justice BLACK, Mr. Justice DOUGLAS and Mr. Justice MURPHY referred to the decision in the *Gobitis* case and make interesting record of their change of mind:

> The opinion of the Court sanctions a device which in our opinion suppresses or tends to suppress the free exercise of a religion practiced by a minority group. This is but another step in the direction which *Minersville School District v. Gobitis,* 310 U. S. 586, took against the same religious minority and is a logical extension of the principles upon which that decision rested. Since we joined in the opinion in the *Gobitis* case, we think this is an appropriate occasion to state that we now believe that it was also wrongly decided. Certainly our democratic form of government functioning under the historic Bill of Rights has a high responsibility to accommodate itself to the religious views of minorities however unpopular and unorthodox those views may be. The First Amendment does not put the right freely to exercise religion in a subordinate position. We fear, however, that the opinions in this and in the *Gobitis* case do exactly that.

Joseph F. Rutherford, Hayden Covington and Osmond K. Frankel argued the cases for Jehovah's Witnesses; John W. Guider argued the case for the City of Opelika and there were no appearances for the respondent in the other two cases.

Administrative Law—Federal Communications Commission—Chain Broadcasting Regulations—Method of Federal Review

The regulations of the Federal Communications Commission prescribing the method to be employed in the conduct of broadcasting network systems and declaring its policy to be to refuse licenses to broadcasting stations which enter into contracts contrary to those regulations, are in effect final orders. When without further action they affect injuriously contractual activities and financial transactions, they are subject to judicial review under the provisions of Section 402 (a) of the Communications Act of 1934, and the Urgent Deficiencies Act.

Columbia Broadcasting System, Inc. v. U. S., 86 Adv. Op. 1066; 62 Sup. Ct. Rep. 1194; U. S. Law Week 4443, (No. 1026, decided June 1, 1942).

The Federal Communications Commission promulgated regulations that no licenses would be granted to any broadcasting station which enters into contracts with any broadcasting network organizations of a type described in the regulations, and therein declared to affect injuriously the ability of the stations and nationwide networks to carry on their business effectively and to render service to the public.

Columbia Broadcasting System pursuant to § 402 (a) of the Communications Act brought suit against the United States in the Southern District of New York to enjoin the enforcement of the Commission's order "as contrary to the public interests and beyond the commission's statutory authority" and alternatively as "an unconstitutional delegation of legislative power by Congress" and as depriving Columbia of property "without due process of law."

The case was heard by a court of three judges. The Federal Communications Commission and the Mutual Broadcasting System were permitted to intervene, as defendants. The three-judge court granted the government's motion to dismiss the complaint for want of jurisdiction and stayed the operation of the Commission's order pending appeal. The Supreme Court reversed the judgment of the statutory court. The question for decision was whether Columbia was entitled to secure a judicial review of the order by a suit brought under 402 (a) of the Communications Act.

The facts stated in Columbia's bill of complaint may be summarized as follows:

Columbia has been engaged in the business of nationwide network or chain broadcasting since 1927. It has acquired a large amount of valuable physical property used in its business and has built up a valuable good-will.

Its commitments by long term contracts for broadcasting expenditures aggregate more than four million dollars for furnishing and broadcasting news and programs in the next few years.

Chain broadcasting is defined as "simultaneous broadcasting of an identical program by two or more connected stations," for which the broadcaster prepares radio programs, engages performers in advance, simultaneously broadcasting them over a large number of radio stations, to which the programs are transmitted. Columbia's programs are divided into two classes "commercial programs" sponsored and paid for by advertisers, and "sustaining programs" furnished by Columbia and not paid for by any advertiser. Columbia agrees not to furnish its sustaining programs to other stations in the same city. The affiliated stations agree not to broadcast programs of any other network; the contract contains one clause "of critical importance in the present litigation" that the affiliated station will, on not less than 28 days' notice from Columbia, broadcast the commercial program furnished by Columbia for at least 79 hours per week. The bill alleges that those provisions of Columbia's contract are "indispensable to the maintenance and efficient operation of its network and to the existence of a network broadcasting system and to enable Columbia to compete with other advertising media."

The opinion of the Court was delivered by the CHIEF JUSTICE. He calls attention to the recitals in the bill that the order and the amended order were characterized by the Commission as "the expression of the general policy we will follow in exercising our licensing power."

The opinion describes in careful detail the provisions of the regulations that no license shall be granted to a broadcasting station having contracts with a network organization containing any of the provisions which are characteristic of Columbia's contract with its affiliates, particularly those by which a station is prevented from broadcasting the programs of any other network organization or prevent any other station from serving substantially the same area or preventing another station which serves a different area from broadcasting any program of the network organization.

The bill of complaint alleges that the regulations are intended to prohibit station licensees from having agreements of the kind Columbia has with its affiliates. The fear inspired by these regulations that their licenses will not be granted or renewed has caused Columbia licensees to cancel and to threaten to cancel their affiliated contracts and to give notice of their intent so to do, and that all the harmful consequences complained of will follow from the mere existence of the regulation without any further action on the part of the commission.

After the long and careful summary of the record which has here been necessarily abbreviated, the CHIEF JUSTICE says:

> Accepting the allegations of the complaint as true, as for present purposes we must, it is evident that application by the Commission of its regulations in accordance with their terms would disrupt appellant's broadcasting system and seriously disorganize its business. As the bill alleges, station licenses have been renewable by the Commission annually, whereas appellant's contracts are for five year periods and many of them will survive the expiration of the existing licenses to the affiliated stations. Under Regulations 3.101, 3.102, 3.103 and 3.104, each affiliate must repudiate his contract or be denied the renewal of his license. In either case this would deprive appellant of the station's participation in its network, for which its contracts call.
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> Regulation 3.104 not only requires all options by appellant to be exercised on 56 days' rather than 28 days' notice as at present, but provides that no option time is exclusive of other networks, and thus allows to appellant no option time within which it can command the use of affiliated stations for any program for broadcasting on a national scale. These sections together thus operate to break down the network enterprise in which appellant and its affiliates are by their contracts cooperating, and to substitute a system in which every station is available to every network on a "first come first served basis."

The CHIEF JUSTICE next considers the relevant statutory provisions. As to these he says:

> A proceeding to set aside an order of the Commission under § 402(a) and the Urgent Deficiencies Act is a plenary suit in equity. Hence the questions raised by the motion to dismiss are whether the Commission's order is an "order," review of which is authorized by § 402(a) of the Act, and if so whether the bill states a cause of action in equity. The suit cannot be maintained unless both questions are answered in the affirmative.
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> . . . Since the Commission's order neither grants, denies nor modifies any license, any review in advance or independently of an application for a station license must be under § 402(a), and then only if the Commission's order promulgating the regulations is an "order" within the meaning of this section. The particular label placed upon it by the Commission is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive.

Commenting upon the Commission's investigation on the contractual relations between the networks and the stations the CHIEF JUSTICE says:

> The order is thus in its genesis and on its face, and in its practical operation, an order promulgating regulations which operate to control such contractual relationships, and it was adopted by the Commission in the avowed exercise of its rule-making power. Such regulations which affect or determine rights generally, even though not directed to any particular person or corporation, when lawfully promulgated by the Interstate Commerce Commission, have the force of law and are orders reviewable under the Urgent Deficiencies Act.

Pointing out the legal consequences which would automatically flow from the regulations, it is declared:

> The regulations here prescribe rules which govern the contractual relationships between the stations and the networks. If the applicant for a license has entered into an affiliation contract, the regulations require the Commission to reject his application. If a licensee renews his contract, the regulations, with the sanction of § 312(a), authorize the Commission to cancel his license. In a proceeding for revocation or cancellation of a license, the decisive question is whether the station, by entering into a contract, has forfeited its right to a license as the regulations prescribe. It is the signing of the contract which, by virtue of the regulations alone, has legal consequences to the stations and to appellant. The regulations are not any the less reviewable because their promulgation did not operate of their own force to deny or cancel a license. It is enough that failure to comply with them penalizes licensees, and appellant, with whom they contract. If an administrative order has that effect it is reviewable and it does not cease to be so merely because it is not certain whether the Commission will enforce the penalty incurred under its regulations for non-compliance.
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> Most rules of conduct having the force of law are not self-executing but require judicial or administrative action to impose their sanctions with respect to particular individuals. Unlike an administrative order or a court judgment adjudicating the rights of individuals, which is binding only on the parties to the particular proceeding, a valid exercise of the rule-making power is addressed to and sets a standard of conduct for all to whom its terms apply. It operates as such in advance of the imposition of sanctions upon any particular individual. It is common experience that men conform their conduct to regulations by governmental authority so as to avoid the unpleasant legal consequences which failure to conform entails. And in

this case it is alleged without contradiction that numerous affiliated stations have conformed to the regulations to avoid loss of their licenses with consequent injury to appellant.

Replying to a contention of the government that the regulations were addressed only to the commission, the CHIEF JUSTICE says:

> It is no answer to say that the regulations are addressed only to the Commission and merely prohibit it from granting—and authorize it to cancel—licenses in the case of all stations entering into such contracts, and that accordingly all stations are left free to enter into contracts or not as they choose. They are free only in the sense that all those who do not choose to conform to regulations which may be determined to be lawful are free by their choice to accept the legal consequences of their acts. Failure to comply with the regulations entails such consequences to the station owner and to appellant. These are the loss of the affiliated stations' licenses if they adhere to their contracts, and disruption of appellant's network through the declared unlawfulness of the contracts, if the regulations are valid.

The question had been raised that if Columbia had any equitable cause of action it must be prosecuted in an ordinary suit. As to this the CHIEF JUSTICE says:

> . . . But we think this mistakes both the nature of the regulations and the purpose of suits under that Act, as incorporated in § 402 (a). Such a cause of action obviously can arise only because of the operation of the regulations. The regulations are the effective implement by which the injury complained of is wrought, and hence must be the object of the attack. It is because they are an exercise of the rule-making power, and because they presently determine rights on the basis of which the Commission is required to withhold licenses and authorized to cancel them, that there is an order within the meaning of § 402 (a) and the Urgent Deficiencies Act.

The Commission also contended that a mere announcement of policy was not a sufficient basis for judicial review and said that the order promulgating announcement of policy was "no more subject to review than a press release similarly announcing its policy." To which the CHIEF JUSTICE replies:

> . . . The Commission's contention that the regulations are no more reviewable than a press release is hardly reconcilable with its own recognition that the regulations afford legal basis for cancellation of the license of a station if it renews its contract with appellant.

Concluding his opinion the CHIEF JUSTICE says:

> We need not stop to discuss here the great variety of administrative rulings which, unlike this one, are not reviewable—either because they do not adjudicate rights or declare them legislatively, or because there are adequate administrative remedies which must be pursued before resorting to judicial remedies, or because there is no occasion to resort to equitable remedies. But we should not for that reason fail to discriminate between them and this case in which, because of its peculiar circumstances, all the elements prerequisite to judicial review are present. The ultimate test of reviewability is not to be found in an overrefined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow, the results of which the regulations purport to control.
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> We conclude that the Commission's promulgation of the regulations is an order reviewable under § 402 (a) of the Act, and that the bill of complaint states a cause of action in equity. The stay now in effect will be continued, on terms to be settled by the court below.

Mr. Justice BLACK took no part in the consideration or decision of the case.

Mr. Justice FRANKFURTER dissented and Mr. Justice REED and Mr. Justice DOUGLAS joined.

In the dissenting opinion he reviews prior decisions which seem to him to be in direct conflict with the majority opinion.

He also reviews at length the allegations of the bill, the provisions of the regulation, its status and effect, and denies that it has the necessary characteristics of a reviewable order. The tenor of his dissent may be gathered from the following excerpt:

> We need go no farther than this litigation to perceive the unfortunate effects of premature judicial review. The chain broadcasting regulations were issued on May 2, 1941, more than a year ago. They were adopted by the Commission as a consequence of its finding, after an investigation lasting more than three years, that certain features of network-affiliation contracts prevented licensees from effectively discharging their obligation to render the fullest service to the listening public. The policy formulated by the Commission may or may not be wise—that is not our concern. But we cannot blink the fact that this litigation has for more than a year prevented the Commission from testing by experience the practical wisdom of a policy found by it to be required by the public interest. The commencement of a proceeding under § 402 (b) would not have presented the jurisdictional problems present in this proceeding. Surely those desirous of a speedy adjudication of the issue of the validity of the regulations were aware that the commencement of a proceeding under § 402 (a) would not produce a prompt adjudication on the merits, but that it would instead result in postponing for a considerable period the effective date of the regulations, with all the contingent advantages afforded by such postponement.
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> Hardship there may well come through action of an administrative agency. But to slide from recognition of a hardship to assertion of judisdiction is once more to assume that only the courts are the guardians of the rights and liberties of the people.

The case was argued by Mr. Charles E. Hughes, Jr., for Columbia; by Mr. Telford Taylor, General Counsel, Federal Communications Commission, for the United States and for the Communications Commission; and by Mr. Louis G. Caldwell for Mutual Broadcasting Co.

National Broadcasting Co. v. U. S., 86 Adv. Op. 1066; 62 Sup. Ct. Rep. 1214; U. S Law Week 4443, (No. 1025, decided June 1, 1942), was also reversed on the authority of the foregoing case.

The case was argued by Mr. John T. Cahill for National; and by Mr. Telford Taylor, General Counsel, Federal Communications Commission, for the United States and for the Communications Commission.

Statutes—Fair Labor Standards Act—Interstate Commerce

The provisions of the Fair Labor Standards Act of 1938 as to minimum wages and overtime are applicable to employees engaged in the operation and maintenance of a building in which goods for interstate commerce are produced by the occupants of the building.

Kirschbaum v. Walling, Admr., and *Arsenal Building Corporation v. Walling, Admr.*, 86 Adv. Op. 1054; 62 Sup. Ct. Rep. 1116; U. S. Law Week 4430. (Nos. 910 and 924, decided June 1, 1942).

In the *Kirschbaum* case, No. 910, a building in Philadelphia was rented to manufacturers of men's and boys' clothing. In the *Arsenal Building* case, No. 924, a 22-story building in New York City was occupied by tenants who manufacture or buy and sell ladies' garments.

It was admitted in both cases that the tenants were principally engaged in the production of goods for interstate commerce but the owners of the building employed engineers, firemen, elevator operators, electricians, watchmen and porters who performed the necessary duties of persons charged with the effective maintenance of the buildings.

The Administrator of the Wage and Hours Division of the U. S. Department of Labor brought suit against the owners of the buildings to enjoin violation of the Fair Labor Standards Act in paying wages at lower rates than those fixed by the Act.

In case No. 910 the District Court granted an injunction and the Circuit Court of Appeals, Third Circuit, affirmed.

In No. 924 the District Court denied an injunction but the Circuit Court of Appeals for the Second Circuit reversed.

The Supreme Court took the case by certiorari because of the important questions presented as to scope of the Fair Labor Standards Act, notwithstanding the concurrence of the views of the two circuit courts, and affirmed the decisions of the Circuit Courts of Appeals.

The opinion of the Court was delivered by Mr. Justice FRANKFURTER. He opens his discussion as follows.

> To search for a dependable touchstone by which to determine whether employees are "engaged in commerce or in the production of goods for commerce" is as rewarding as an attempt to square the circle. The judicial task in marking out the extent to which Congress has exercised its constitutional power over commerce is not that of devising an abstract formula. Perhaps in no domain of public law are general propositions less helpful and indeed more mischievous than where boundaries must be drawn under a federal enactment between what it has taken over for administration by the central Government and what it has left to the States. To a considerable extent the task is one of accommodation as between assertions of new federal authority and historic functions of the individual States. The expansion of our industrial economy has inevitably been reflected in the extension of federal authority over economic enterprise and its absorption of authority previously possessed by the States. Federal legislation of this character cannot therefore be construed without regard to the implications of our dual system of government.

Mr. Justice FRANKFURTER declares that the process of legislation in the regulation of commerce has been "strikingly empiric." That statement is verified by an examination of the many cases cited and reviewed in the opinion and from which the following is deduced.

> We cannot, therefore, indulge in the loose assumption that when Congress adopts a new scheme for federal industrial regulation, it thereby deals with all situations falling within the general mischief which gave rise to the legislation. Such an assumption might be valid where remedy of the michief is the concern of only a single unitary government. It cannot be accepted where the practicalities of federalism—or, more precisely, the underlying assumptions of our dual form of government and the consequent presuppositions of legislative draftsmanship which are expressive of our history and habits—cut across what might otherwise be the implied range of the legislation. Congress may choose, as it has chosen frequently in the past, to regulate only part of what it constitutionally can regulate, leaving to the States activities which, if isolated, are only local.

Here again cases are cited and analyzed, after which Mr. Justice FRANKFURTER continues as follows:

> . . . The history of Congressional legislation regulating not only interstate commerce as such but also activities intertwined with it, justifies the generalization that, when the federal government takes over such local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating are reasonably explicit and do not entrust its attainment to that retrospective expansion of meaning which properly deserves the stigma of judicial legislation.

In the interpretation of the Act and its application to employees of the class here under consideration who although not named in the Act were considered by the Administrator to be embraced in its terms, the history of the legislation was considered and reviewed and Mr. Justice FRANKFURTER says:

> Since the scope of the Act is not coextensive with the limits of the power of Congress over commerce, the question remains whether these employees fall within the statutory definition of employees "engaged in commerce or in the production of goods for commerce," construed as the provision must be in the context of the history of federal absorption of governmental authority over industrial enterprise.
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> We start with the weighty opinions of the two Circuit Courts of Appeals that the employees here are within the Act because they were engaged in occupations "necessary to the production" of goods for commerce by the tenants. Without light and heat and power the tenants could not engage, as they do, in the production of goods for interstate commerce. The maintenance of a safe, habitable building is indispensable to that activity. The normal and spontaneous meaning of the language by which Congress defined in § 3(j) the class of persons within the benefits of the Act, to wit, employees engaged "in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof," encom-

passes these employees, in view of their relation to the conceded production of goods for commerce by the tenants.

In answer to the contention of the owners of the building that the building industry is purely local in its nature, and that the Act does not apply where the employer is not himself engaged in an industry partaking of interstate commerce, Mr. Justice FRANKFURTER says:

> . . . The petitioners assert, however, that the building industry of which they are part is purely local in nature and that the Act does not apply where the employer is not himself engaged in an industry partaking of interstate commerce. But the provisions of the Act expressly make its application dependent upon the character of the employees' activities. And, in any event, to the extent that his employees are "engaged in commerce or in the production of goods for commerce," the employer is himself so engaged. Nor can we find in the Act, as do the petitioners, any requirement that employees must themselves participate in the physical process of the making of the goods before they can be regarded as engaged in their production. Such a construction erases the final clause of § 3(j) which includes employees engaged "in any process or occupation necessary to the production" and thereby does not limit the scope of the statute to the preceding clause which deals with employees "in any other manner working on such goods."

The lower courts had given consideration to the definition of the word "necessary." Counsel for the contending parties had also emphasized the importance of that word and presented their opposing views. As to that word Mr. Justice FRANKFURTER says:

> . . . In our judgment, the work of the employees in these cases had such a close and immediate tie with the process of production for commerce, and was therefore so much an essential part of it, that the employees are to be regarded as engaged in an occupation "necessary to the production of goods for commerce." What was said about a related problem is not inapposite here: "Whatever terminology is used, the criterion is necessarily one of degree and must be so defined. This does not satisfy those who seek for mathematical or rigid formulas. But such formulas are not provided by the great concepts of the Constitution such as "interstate commerce," "due process," "equal protection." In maintaining the balance of the constitutional grants and limitations, it is inevitable that we should define their applications in the gradual process of inclusion and exclusion.

The opinion closes with the rejection of a minor point.

> A final objection to the decisions below need not detain us long. The petitioners' buildings cannot be regarded as "service establishments" within the exemption of § 13(a)(2). Selling space in a loft building is not the equivalent of selling services to consumers, and, in any event, the "greater part" of the "servicing" done by the petitioners here is not in intrastate commerce. The suggestion that the Act, if applied to these employees, goes beyond the bounds of the commerce power is without merit.

Mr. William Clark Mason argued the case for Kirschbaum; Mr. Walter Gordon Merritt argued the case for Arsenal Building Corporation; and Mr. Charles Fahy, Solicitor General, argued the case for the Government.

Administrative Law—Labor Law—Wages and Hours—The Fair Labor Standards Act

While the Fair Labor Standards Act seems to deal only with employment in which hours and compensation are definitely fixed and does not specifically embrace employment where the hours of service are indefinite and fluctuate from time to time, nevertheless employer and employee may agree on a basic rate per hour applicable to fluctuating hours of employment and may agree upon the payment of time and a half computed on that basic rate if the result of that computation is not less than that prescribed in the Act.

Walling, Administrator, v. A. H. Belo Corporation, 86 Adv. Op. 1166; 62 Sup. Ct. Rep. 1223; U. S. Law Week, 4455. (No. 622, decided June 8, 1942).

The Belo Corporation, publisher of the Dallas *Morning News* and the owner of radio station WFAA, has some 600 employees. Those in the mechanical departments work under a collective bargaining agreement and are not affected by the Fair Labor Standards Act. Others, and particularly those in the newspaper business, work irregular hours, and before the effective date of that Act the Corporation had been paying its newspaper employees more than the minimum wage required by the Act. They were also given vacations at full pay, bonuses at the end of the year, full pay during illness, and time off to attend to personal affairs without deductions. When their work required long hours in any week, they were given compensating time off in succeeding weeks. Life insurance was carried for them at the expense of the employer.

In order to meet the requirements of the Fair Labor Standards Act and to adjust wages and hours of its newspaper employees to the spirit of that Act (it did not specifically deal with those whose employment required irregular and unspecified hours of labor) the employees were notified that "without reducing the amount of money which you receive each week, we advise that from and after October 24, 1938, your basic rate of pay will be . . . 67 . . . cents per hour for the first forty-four hours each week, and that for time over forty-four hours each week you will receive for each hour of work not less than one and one-half time . . . the basic rate above mentioned, with a guaranty on our part that you shall receive weekly, for regular time and for such overtime as the necessities of the business may demand, a sum not less than . . . $40 . . . "

This adjustment went into force and was continued eighteen months to the apparent satisfaction of employer and employees. The employer was then advised through the Wage and Hour Division that the arrangement was in violation of the Act and that it was liable to its employees in an amount of from 30 to 60 thousand dollars.

The employer thereupon brought suit for a declaratory judgment in the District Court for the Northern District of Texas, making three of its employees and the regional director of the Wage and Hour Division defendants. The defendant employees answered that they and all the other employees affected by the system

approved of it. The regional director then instituted suit to enjoin the employer from continuing to operate the wage system above described. The two suits were consolidated and tried together. The district court entered a declaratory judgment for the employer and dismissed the director's bill for an injunction. The director appealed to the Circuit Court of Appeals from the dismissal of its complaint. That court affirmed the judgment of the district court. It found that the contracts were bona fide contracts of employment and that they intended to and did really fix the regular rates at which each employee was employed. Certiorari was granted because of the importance of the question in the administration of the Act, and the Supreme Court affirmed the decision of the Circuit Court of Appeals.

The opinion of the Court was delivered by Mr. Justice BYRNES. After setting forth the proceedings and contentions in the lower courts, he says:

> It is no doubt true, as petitioner contends, that the purpose of respondent's arrangement with its employees was to permit as far as possible the payment of the same total weekly wage after the Act as before. But nothing in the Act bars an employer from contracting with his employees to pay them the same wages that they received previously, so long as the new rate equals or exceeds the minimum required by the Act.
>
> The Act requires that for each hour of work beyond the statutory maximum the employees must be paid "not less than one and one-half times the regular rate at which he is employed." This case turns upon the meaning of the words "the regular rate at which he is employed." Repondent contends that the regular rate under the illustrative contract, which is set out above and to which we shall refer throughout, is 67 cents an hour. Petitioner argues, however, that the 67 cents hourly rate mentioned in the contract is meaningless and that the agreement is in effect for a weekly salary of $40 without regard to fluctuations in the number of hours worked each week. Treating the contract as one for a fixed weekly salary, he urges that the regular hourly rate for any single week is the quotient of the $40 guaranty divided by the number of hours actually worked in that week. Under this formula the employee is entitled to the regular hourly rate thus determined for the first 44 hours each week and to not less than one and one-half times that rate for each hour thereafter.

It was not disputed by counsel for the administrator that the question involved raises a question of law as to the interpretation of the statutory term "regular rate," and it was agreed that as a matter of law employer and employee might establish the "regular rate" by contract. The difficulty here arose from the inclusion of the $40 guaranty. The problem was whether the intention of the parties to set 67 cents an hour as the regular rate squares with their intention to guarantee a weekly income of $40. The Administrator's position was that the two objectives are inherently inconsistent and that the intention to fix the regular hourly rate at 67 cents was overridden by the intention to guarantee the $40 per week.

To this, Mr. Justice BYRNES says:

> We cannot agree. In the first place, when an employee works more than 54½ hours in a single week, he is admittedly entitled to more than the $40 guaranty.
>
> * * *
>
> In the second place, although it is perfectly true that when the employee works less than 54½ hours during the week his pay is determined by the $40 guaranty, it does not dispose of the problem simply to say this. The question remains whether the $40 contemplates compensation for overtime as well as basic pay.

Computations set out in the opinion indicate that in any event the employee receives not less than 150% of the basic rate, although the overtime rate may vary from week to week, and it is declared that nothing in the Act forbids such fluctuation. Discussing the position of the Administrator, Mr. Justice BYRNES says:

> The gist of the Administrator's objection to this interpretation is that both the basic rate and the overtime rate are so "artificial" that the parties to the contract cannot fairly be supposed to have intended that it be so construed. It cannot be denied that the flexibility of the overtime rate is considerable, but this flexibility may well have been intended if it was the only means of securing uniformity in weekly income. Moreover, under the Administrator's interpretation, the regular rate in the example given is $40 divided by the number of hours worked each week. Since the number of hours worked fluctuates so drastically from week to week, this "regular" rate is certainly "irregular" in a mathematical sense. And inasmuch as it cannot be calculated until after the work week has been completed, it is difficult to say that it is "regular" in the sense that either employer or employee knows what it is or can plan on the basis of it.

Alternative plans are examined and analyzed and applied to the intention of Congress so far as it is expressed in the Act. Mr. Justice BYRNES concludes his opinion as follows:

> The problem presented by this case is difficult—difficult because we are asked to provide a rigid definition of "regular rate" when Congress has failed to provide one. Presumably Congress refrained from attempting such a definition because the employment relationships to which the Act would apply were so various and unpredictable. And that which it was unwise for Congress to do, this Court should not do. When employer and employees have agreed upon an arrangement which has proven mutually satisfactory, we should not upset it and approve an inflexible and artificial interpretation of the Act which finds no support in its text and which as a practical matter eliminates the possibility of steady income to employees with irregular hours. Where the question is as close as this one, it is well to follow the Congressional lead and to afford the fullest possible scope to agreements among the individuals who are actually affected. This policy is based upon a common sense recognition of the special problems confronting employer and employee in businesses where the work hours fluctuate from week to week and from day to day. Many such employees value the security of a regular weekly income. They want to operate on a family budget, to make commitments for payments on homes and automobiles and insurance. Congress has said nothing to prevent this desirable objective. This Court should not.

Mr. Justice REED dissented, in which dissent Mr. Justice BLACK, Mr. Justice DOUGLAS and Mr. Justice MURPHY joined. The basis of the dissent is shown by the following excerpts:

The Court's interpretation that, in the absence of bad faith, any form of contract which assures the payment of the minimum wage and the required overtime complies with the Act may be assumed to be correct. But since the overtime hours must be compensated "at a rate not less than one and one-half times the regular rate at which he is employed" (Sec. 7 (a) (3)), the regular rate cannot be left without "definition," "flexible" or unfound for this case. And once so found, it must be applied to the circumstances of this litigation. No all inclusive definition will be attempted. The possibilities of variation in contracts are too great. Certainly, however, the Court does not mean to say that the employer and employee may capriciously select a certain figure, unrelated to the wages paid, and say "That is the regular rate of employment." Every contract of employment is assumed, by the statute, to contain a "regular rate," and for each contract it is a legal, not a factual, conclusion.

* * *

. . . We come then to this point. Are the contracts here involved for weekly wages with variable hours or for hourly rates with time and a half of such rates for overtime? If the latter, respondent contends the Act has left him free to contract with his employees at such hourly regular rates as may be agreed upon, limited only by the minimum wage requirements. As a court, we must appraise the nature of these contracts and in my judgment they are agreements for weekly wages for variable hours, with a provision for additional compensation per hour contingent upon work in excess of an ascertainable number of hours—the number of hours of work required for the wages earned under the hourly wage terms of the contract to equal the guaranty. Until these hours are exceeded, the stipulated wage per hour has no demonstrable effect.

* * *

It seems obvious that the guaranty was the heart of the arrangement. The effect of the contract in the illustrative case is to pay 73 cents an hour for work up to 54½ hours and $1.00 (expressed in the circumlocution of time and a half 67 cents) for overtime beyond those hours, with a guaranty that there will be $40 worth of work each week. The "basic" hourly rate, the hours contracted for at the basic rate and the stated percentage paid for overtime may be varied without effect on earnings provided the guaranty and real overtime rate are kept fixed.

* * *

It is the guaranty which gives character to these contracts, which determines the amount to be received by the employee under its terms, except in the instances of work beyond 54½ hours. It is only work beyond the 54½ hours which calls for extra pay from the employer. Consequently it seems proper to find the regular rate of employment by using the guaranty as the dividend and the maximum hours possible without increased contract pay as the divisor. The objection that this permits statutory overtime pay to be computed on contract overtime pay springs from the wording of the contract making the guaranty cover overtime up to the 54½ hours. This objection loses its force with the determination that the guaranty fixes the quality of the contract, rather than the so-called basic or hourly rate of pay.

The case was argued by Mr. Charles Fahy, Solicitor General, for the government and by Mr. Maurice E. Purnell, for the employer.

Administrative Law—Labor Law—Wages and Hours—The Fair Labor Standards Act

The overtime section of the Fair Labor Standards Act of 1938 applies to an employee working irregular hours for fixed weekly wages. The legislative establishment to regulate wages and hours exists even though the hours or wages are not patently burdensome to health. Long hours and low pay may impede the free interstate flow of commodities by creating friction and affording opportunities for unfair competition and through interruption of work.

Overnight Motor Transportation Company v. Missel, 86 Adv. Op. 1159; 62 Sup. Ct. Rep. 1216; U. S. Law Week, 4459. (No. 939, decided June 8, 1942).

This case involves the application of the overtime section of the Fair Labor Standards Act of 1938 to an employee working irregular hours for a fixed weekly wage. One Missel was an employee of the Overnight Motor Transportation Company. He acted as a rate clerk and performed other incidental duties. His work involved wide fluctuations in the time required to complete his duties. It began before the effective date of the Fair Labor Standards Act. His average work week was 65 hours, with a maximum of 80 hours in the first year and 75 hours in the second. Nothing above the weekly wage was paid, because the maximum work weeks, computed at the statutory minimum rates with time and a half, did not require an addition to his weekly wage.

Missel brought an action to recover unpaid overtime compensation in such sum as might be found due him, and additional equal amount as liquidated damages, and counsel fee. The trial court decided in favor of the employer on the ground that an agreement for a fixed weekly wage for irregular hours satisfied the requirements of the Act, and that pay would be adequate which amounted to the required minimum for the regular hours, and time and a half the minimum for overtime. The Circuit Court of Appeals reversed with directions to enter judgment for the plaintiff. The Supreme Court granted certiorari since the questions involved were important in the administration of the Fair Labor Standards Act, and affirmed the decision of the Circuit Court.

The opinion of the Court was rendered by Mr. Justice REED. Defining the issues, the opinion says:

> Petitioner renews here its contentions that the private right to contract for a fixed weekly wage with employees in commerce is restricted only by the requirement that the wages paid should comply with the minimum wage schedule of the Fair Labor Standards Act, section 6, with overtime pay at time and a half that minimum, that in any event the Act does not preclude lump sum salaries in excess of the minimum, and that a contrary interpretation of the statute would render it unconstitutional.

Taking up the contention of the employer that there is no power under the constitution to regulate the hours and wages of workers whose pay in every instance at least equals the minimum and whose hours are not injurious to health, Mr. Justice REED says:

> . . . But hours or wages not patently burdensome to health may yet be subject to regulation to achieve other

purposes. We assume here the statutory objectives discussed later, i.e., that the act is aimed at hours as well as wages. The commerce power is plenary, may deal with activities in connection with production for commerce and as said in the *Darby* case, may extend "to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce". . . . Long hours may impede the free interstate flow of commodities by creating friction between production areas with different length workweeks, by offering opportunities for unfair competition through undue extension of hours, and by inducing labor discontent apt to lead to interference with commerce through interruption of work.

As to the construction of the statute, Mr. Justice REED says:

. . . We agree that the purpose of the act was not limited to a scheme to raise substandard wages first by a minimum wage and then by increased pay for overtime work. Of course, this was one effect of the time and a half provision, but another and an intended effect was to require extra pay for overtime work by those covered by the act even though their hourly wages exceeded the statutory minimum. The provision of section 7(a) requiring this extra pay for overtime is clear and unambiguous. It calls for 150% of the regular, not the minimum, wage. By this requirement, although overtime was not flatly prohibited, financial pressure was applied to spread employment to avoid the extra wage and workers were assured additional pay to compensate them for the burden of a workweek beyond the hours fixed in the act. In a period of widespread unemployment and small profits, the economy inherent in avoiding extra pay was expected to have an appreciable effect in the distribution of available work.

Coming to the interpretation of the words "regular rate at which he is employed," Mr. Justice REED says:

. . . Since we have previously determined in this opinion, in the discussion of petitioner's objection to the application of the Act on the ground of unconstitutionality, that the scope of the commerce power is broad enough to support federal regulation of hours, we are concerned at this point only with the method of finding the regular rate under the contract with respondent. Congress might have sought its objective of clearing the channel of commerce of the obstacles of burdensome labor disputes by minimum wage legislation only. We have seen that it added overtime pay. The wages for minimum pay are expressed in terms of so much an hour. Sec. 6(a) (1)—"Not less than 25 cents an hour" with raises for succeeding years or by order of the Administrator under Sec. 8. Cf. *Opp Cotton Mills v. Administrator*, 312 U. S. 126. Neither the wage, the hour nor the overtime provisions of sections 6 and 7 on their passage spoke specifically of any other method of paying wages except by hourly rate. But we have no doubt that pay by the week, to be reduced by some method of computation to hourly rates, was also covered by the act. It is likewise abundantly clear from the words of section 7 that the unit of time under that section within which to distinguish regular from overtime is the week. "No employer shall . . . employ any of his employees . . . (1) for a workweek longer than forty-four hours . . ." Sec. 7(a) (1).

As to the assimilation of the computation of overtime for employees under contract for a fixed weekly wage for regular contract hours, to similar computations for employees on hourly rates, it is declared:

. . . Where the employment contract is for a weekly wage with variable or fluctuating hours the same method of computation produces the regular rate for each week. As that rate is on an hourly basis, it is regular in the statutory sense inasmuch as the rate per hour does not vary for the entire week, though week by week the regular rate varies with the number of hours worked. It is true that the longer the hours the less the rate and the pay per hour. This is not an argument, however, against this method of determining the regular rate of employment for the week in question. Apart from the Act if there is a fixed weekly wage regardless of the length of the workweek, the longer the hours the less are the earnings per hour. This method of computation has been approved by each circuit court of appeals which has considered such problems.

The employer invoked the presumption that contracting parties contemplate compliance with law and contends that accordingly "there is no warrant for construing the contract as paying the employee only his base pay or 'regular rate,' regardless of hours worked. . . ." On this point, Mr. Justice REED says:

It is true that the wage paid was sufficiently large to cover both base pay and fifty per cent additional for the hours actually worked over the statutory maximum without violating section six. But there was no contractual limit upon the hours which petitioner could have required respondent to work for the agreed wage, had he seen fit to do so, and no provision for additional pay in the event the hours worked required minimum compensation greater than the fixed wage. Implication cannot mend a contract so deficient in complying with the law. This contract differs from the one in *Walling v. Belo*, decided today, where the contract specified an hourly rate and not less than time and a half for overtime, with a guaranty of a fixed weekly sum, and required the employer to pay more than the weekly guaranty where the hours worked at the contract rate exceeded that sum.

As to the claim of the employee under the liquidated damages provision of the Act, after reviewing the history of the legislation, Mr. Justice REED says:

Perplexing as petitioner's problem may have been, the difficulty does not warrant shifting the burden to the employee. The wages were specified for him by the statute, and he was no more at fault than the employer. The liquidated damages for failure to pay the minimum wages under sections 6(a) and 7(a) are compensation, not a penalty or punishment by the Government. . . . The retention of a workman's pay may well result in damages too obscure and difficult of proof for estimate other than by liquidated damages. . . . Nor can it be said that the exaction is violative of due process. It is not a threat of criminal proceedings or prohibitive fines, such as have been held beyond legislative power by the authorities cited by petitioner. Even double damages treated as penalties have been upheld as within constitutional power.

The CHIEF JUSTICE concurred in the result. Mr. Justice ROBERTS dissented.

The case was argued by Messrs. J. Ninian Beall and John R. Norris for the transportation company and by Mr. Charles Fahy, Solicitor General, for the employee, Missel.

Taxation—Real Estate Taxes

In general, taxes paid on real estate are "deductible only by the person on whom they are imposed." The law of the place determines upon whom they are imposed. In Maryland taxes are imposed upon the owner notwithstanding an agreement by a grantee to pay a ratable portion thereof.

Magruder, Collector, v. Supplee, 86 Adv. Op. 1025; 62 Sup. Ct. Rep. 1162; U. S. Law Week 4400. (No. 947, decided May 25, 1942.)

During 1936 and 1937 one Supplee and his wife purchased real estate in Maryland on which the current year's taxes had not been paid, at the time of purchase. The contracts provided for the apportionment of current taxes and they were subsequently apportioned between grantor and grantee and paid as apportioned.

In the 1936 and 1937 income tax returns the purchasers deducted that portion of those taxes applicable to the period after purchase.

The Commissioner of Internal Revenue ruled that the payment by grantees of the allocated portion of the taxes was merely the payment of a part of the cost of the properties and therefore not deductible. A deficiency assessment was made and paid under protest. This suit for refund followed. The district court held the amounts deductible. The Circuit Court of Appeals affirmed. On certiorari, the Supreme Court reversed the lower courts and sustained the view of the Commissioner.

The opinion of the Court was delivered by Mr. Justice MURPHY. He says:

> The guiding principle for determining whether a payment satisfying a tax liability is a "tax paid" within the meaning of Section 23(c) is furnished by the applicable Treasury regulation, which states that "In general taxes are deductible only by the person upon whom they are imposed". . . . Resort must be had here to the laws of Maryland and of the City of Baltimore to determine upon whom the state and city real estate taxes were imposed.

To illustrate concretely the workings of Maryland taxation, a case typical of all the other transactions was examined in detail and from that typical transaction Mr. Justice MURPHY concluded:

> It is thus apparent that tax liens had attached against the properties and that respondents' predecessors in title had become personally liable for the taxes prior to any of the purchases. The attachment of a lien for taxes against property before its sale has been held to prohibit the vendee from deducting as "taxes paid," amounts paid by him to discharge this liability. . . . A tax lien is an encumbrance upon the land, and payment, subsequent to purchase, to discharge a pre-existing lien is no more the payment of a tax in any proper sense of the word than is payment to discharge any other encumbrance, for instance a mortgage.

Admitting that the grantees could not have retained the properties unless the taxes were paid it was declared that they could not have been retained without paying the purchase price and it was therefore no answer to say that the property was burdened with taxes which the grantees became obligated to pay as taxes; that if there was a burden, it was contractually assumed, and Mr. Justice MURPHY says:

> In discharging this assumed obligation respondents were not paying taxes imposed upon them within the meaning of Section 23(c). For "only the person owning the property at that time [i.e., when the tax lien attaches] is subjected to the burden which the law imposes; and only the person who has been thus subjected to the burden of the tax is entitled to a deduction for paying it. Payment by a subsequent purchaser is not the discharge of a burden which the law has placed upon him, but is actually as well as theoretically a payment of purchase price; for, after the lien attaches and the taxing authority becomes pro tanto an owner of an interest in the property, payment of the tax by a purchaser is nothing but a part of the payment for unencumbered title."

Emphasizing the fact that the payment was in reality the payment of a pre-existing tax lien for which the grantor was primarily liable, Mr. Justice MURPHY concludes the opinion as follows:

> Where both lien and personal liability coincide, as here, there can be no other conclusion than that the taxes were imposed on the vendors. Respondents simply paid their vendors' taxes; they cannot deduct the amounts, or any portion thereof, paid to discharge liabilities so firmly fixed against their predecessors in title by the laws of Maryland.
>
> The view of the court below that the parties' contractual arrangement for apportionment of the tax burden was controlling is untenable. Parties cannot change the incidence of local taxes by their agreement. And it is misleading to speak of real estate taxes as "applicable" to the fractional part of a tax period following purchase. Such taxes are simply one form of raising revenue for the support of government. They are not like rent, nor are they paid for the privilege of occupying property for any given period of time.

Mr. Douglass B. Maggs argued the case for Magruder; and Mr. Nathan J. Felsenberg argued the case for the Supplees.

Patent Law—Improvement Patents

A patent claim which is limited to an improvement in elements of an old machine is not invalidated by reference to the machine in the claim or by description in the claim, of old elements or portions of the machine with which the new elements cooperate. *Bassick v. Hollingshead,* 298 U. S. 415 and *Lincoln Engineering Company v. Stewart Warner Corporation,* 303 U. S. 545 distinguished.

Williams Manufacturing Company v. United Shoe Machinery Corporation, 86 Adv. Op. 1033; 62 Sup. Ct. Rep. 1179; U. S. Law Week 4403. (No. 332, decided May 25, 1942.)

This suit was brought by the United Shoe Manufacturing Corporation against the Williams Manufacturing Company for infringement of certain claims of McFeely Patent No. 1,558,737 for improvements in automatic heel lasting machines.

The district court held the claims valid and infringed. The Circuit Court of Appeals affirmed. The Supreme Court affirmed.

The facts were first reviewed and analyzed. They may be summarized as follows:

The United Corporation was the assignee of many patents issued to McFeely and to others. United charged that Williams Company infringed its patents, particularly the one above specified. The patent had been preceded by many other patents in the automatic listing

machinery field and covered three improvements which in conjunction with the means described in former patents made practical and more efficient the Company's previously acquired patents and patented processes. The difficulty experienced in the operation of machines covered by the earlier patents was that they could not well be used on a wide range of shoe sizes. The improvement patent here involved enabled the operator of the machine by slight manual manipulations to have an increased range in the different sizes of shoes which might be turned out by manipulation of the improved machine.

The opinion of the Court was delivered by Mr. Justice ROBERTS. Opening the discussion of the character of the challenged claims he says:

> The courts below have concurrently found that none of the earlier patents cited, including that of McFeely, embodied the combinations of the challenged claims covering means for clamping and holding the last, means for the movement of wipers and tackers in fixed relation to each other, and means for the timed vertical positioning of the last during the power stroke of the machine, each combination including means for manually adjusting the mechanism in advance for different sizes of shoes. These findings are to the effect that the new combinations, while they involve old mechanical constructions, combine these in a new way so as to produce an improved result. These are findings of fact, despite the petitioner's apparent contention to the contrary, and we will not disturb such concurrent findings where, as here, there is evidence to support them. The claim that the combinations are merely of old elements, which perform no new function and produce no new result, must be overruled.

Proceeding to the contention of the Williams Company that the decision of the courts below is founded upon the theory that the improvements and adjustments disclosed in the claims entitled McFeely to re-patent the entire combination of the old devices, it was declared that the contention "is not in accord with the holdings below," and Mr. Justice ROBERTS says:

> It is true that both courts found that manual adjustments are provided which are not found in the earlier McFeely patent or in the prior art as applied to the three combinations embodied in the claims in suit. But the findings do not stop there. In respect of each claimed combination, both courts have found that they embody other improvements, in addition to mere manual preliminary adjustments and that each combination exhibits invention in that its elements cooperate in a new and useful way to accomplish an improved result.

The Williams Company contended that the machinery Corporation instead of patenting the combination, sought to blanket every machine which combines the old devices with the improvement. As to this Mr. Justice ROBERTS says:

> In describing the novel combinations embodied in the claims, it was necessary to make reference to certain portions of the machine in connection with which the new combinations were to operate and with which they were to dovetail, but, in mentioning these other mechanical parts, the claim does not purport to embody them as elements of the claimed combination. To construe such a claim for a combination of new elements intended to be embodied in some well recognized mechanical aggregation, such as a sewing machine or a washing machine, as a claim covering all the mechanical details, or all the well known parts of the machine, would be to nullify every patent for an improvement in a type of machine long in use and would invalidate thousands of patents for improvements in standard machines. It would be difficult to describe an improvement in a washing machine without naming such a machine as the thing to which the patent is addressed and equally difficult to refrain from referring to various parts of the machine, such as the tub or the motor which actuates the washer. But it has never been thought that a claim limited to an improvement in some element of the machine is, by such reference, rendered bad as claiming a monopoly of tubs or motors used in washing machines.

Mr. Justice ROBERTS next reviews the various cases cited in support of the Williams Company's theory of contributory infringement and closes discussion of the case as follows:

> The respondent does not pretend to fix liability on the petitioner for contributory infringement by reason of the use of an automatic power driven lasting and tacking machine which does not employ the novel improvements of the combinations claimed, and could not do so. It is admitted, as it must be, that the petitioner is free to use the machine shown in the first McFeely patent which has expired, or any other automatic lasting and tacking machine which does not embody the three improvements covered by the claims in suit. It is not free, however, to use such a machine if it embodies any one of the three combinations embraced in those claims respectively. The use of these combinations is the basis of its liability for infringement.

Mr. Justice BLACK filed a dissenting opinion with which Mr. Justice DOUGLAS and Mr. Justice MURPHY concurred. He begins his criticism of the unwarranted scope and breadth of the claims by quoting from Mr. Justice Bradley the following sentence:

> We think it proper to reiterate our disapprobation of these ingenious attempts to expand a simple invention of a distinct device into an all-embracing claim, calculated by its wide generalizations and ambiguous language to discourage further invention in the same department of industry and to cover antecedent inventions. Without deciding that a repetition of substantially the same claim in different words will vitiate a patent, we hold that where a specification by ambiguity and a needless multiplication of nebulous claims is calculated to deceive and mislead the public, the patent is void.

Mr. Justice BLACK recognizes the "great technological achievement," evidenced by the automatic power driven heel seat laster and the inventions which followed it as the result of the skill, perseverance and creative genius "of countless persons throughout many centuries." He traces the history of the use of machines in the manufacture of shoes and the growth of the United Shoe Machinery Corporation. He analyzes the improvements involved in the claims under consideration and says:

> The improvements said to cure the deficiencies in the earlier machine are covered in the five claims here held valid. Insofar as these claims set out anything not contained in the first McFeely patent, the modifications are not at all complex. . . .
>
> There is no doubt that the United Shoe Machinery Cor-

poration, particularly since it maintains a patent department in which patent lawyers are regularly employed, could have caused these simple improvements to be patented separately and without ambiguity or prolixity. No possible justification can be offered for inextricably combining the description of the alleged improvements with a description of a complete lasting machine. Let us now turn to the patent in suit to see how far it meets the requirement of R. S. § 4888, 35 U. S. C. § 33, that a patentee "shall particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery."

He points out that the patent sets out 137 claims covering 16 large printed pages and has a text of more than 25,000 words. He quotes from the remarks of Judge Hand: "Such claims violate the very purpose of any claims at all, which is to define the forbidden field. In such a waste of abstract verbiage . . . it takes the scholastic ingenuity of a St. Thomas with the patience of a yogi to decipher their meaning as they stand."

Referring to the scope of improvement patents Mr. Justice BLACK says:

> One who invents improvements on a prior invention, whether his own or someone else's, may patent the improvements separately. But I do not believe that our patent system was intended to allow the indiscriminate jumbling of the new and the old which would permit the inventor of improvements to extend his domain of monopoly by perpetuating rights in old inventions beyond the 17 years period Congress has provided.

Many of the 137 claims are taken up and criticised. Space is not here available to follow that part of the opinion in detail.

Next follows a consideration of what is termed "an independent narrower ground for reversing the decision below."

In introducing this portion of his decision Mr. Justice BLACK says:

> The five claims here relied upon set out only an aggregation of old elements not constituting patentable invention. And where as here an appellate court can determine from a mere construction and comparison of patents that an alleged new invention is in reality identical with inventions claimed in prior patents, the question of patentability should be reviewed. . . .
>
> It was the view of both courts below that although a machine manufactured under McFeely's earlier patent had "successfully lasted shoes of specific sizes, it proved incapable of operating satisfactorily upon a range of sizes large enough to adapt it for commercial operation in the ordinary shoe factory." The five claims in suit relate to three small adjustments of the first McFeely machine intended to cure this alleged deficiency. The respondent nowhere asserts that the adjustments were intended to accomplish any other purpose or that in fact they did. Nor did the courts below rest their conclusions upon findings that any other purpose was accomplished. They found novelty and usefulness in the increased adaptability of the later machines over a wider range of sizes; and in the minor mechanical changes made to cure the short-comings of the earlier machines, they found patentable invention.
>
> But novelty and usefulness are not enough, for to be patentable, improvements "must, under the Constitution and the statute, amount to an invention or discovery." . . . And even though improvements produce "a more convenient and economical mechanism," or a "more convenient and more salable" product, or a machine of "greater precision," they are not patentable if they "sprang naturally from the expected skill of the maker's calling." As this Court said in 1875, "Perfection of workmanship, however much it may increase the convenience, extend the use, or diminish expense, is not patentable."

In the application of those principles of patent law Mr. Justice BLACK reviews the history of the art and says:

> Technological knowledge and development had advanced too far by 1916 to warrant elevation of such hand adjustments to the privileged position reserved for inventions. Either in or out of the combination these adjustments performed no more than the old functions that adjustments by hand levers and set screws had always performed. Yet without these hand adjustments the problem alleged to have been revealed by operation of the first McFeely machine would not have been met. For hand adjustments were the indispensable elements of the claimed improvements. Since I believe that such adjustments should not be raised to the dignity of patentable invention, I think the five claims should be held invalid.

The case was argued by Mr. H. A. Toulmin, Jr. for the Williams Manufacturing Company, and by Mr. Harrison F. Lyman for the United Shoe Machinery Corporation.

Anti-Trust Act—Consent Decree Restraining Combination—Modification of Decree

The modification of a consent decree extending for two years the time within which the parent company, Chrysler Corporation, is forbidden to become affiliated with a credit finance company, was within the discretion of the District Court under its reserved power to modify the decree. Under the circumstances, no abuse of the discretion is found, since defendant failed to make a showing that it would be prejudiced by extending the time limit.

Chrysler Corporation v. United States, 86 Adv. Op. 1093; 62 Sup. Ct. Rep. 1146; U. S. Law Week, 4421. (No. 1036, decided June 1, 1942).

The issue in this case was the propriety of an order of the District Court modifying a consent decree against Chrysler.

Chrysler with its subsidiaries was indicted and charged with combination and conspiracy to restrain trade in selling and financing the sales of its automobiles, in violation of the Sherman Act. Ford and its affiliates and General Motors and its affiliates were similarly indicted.

Later, Chrysler and Ford reached an agreement with the government that the indictments would be quashed and consent decrees would be entered. A bill in equity was filed against Chrysler praying for an injunction, and after answer was filed, a consent decree was entered on November 15, 1938.

Various restrictions were imposed by the decree, but, by paragraph 12A it was provided that if the criminal proceedings against General Motors should fail, the consent decree against Chrysler would be suspended until a substantially identical decree should be made against General Motors, or, that upon con-

viction of General Motors in the criminal case or upon the entry of a decree in a civil action against General Motors, or upon January 1, 1940—whichever should occur first—Chrysler would be free of all restraints imposed by paragraph 6 to the extent that substantially identical restraints had not been imposed on General Motors by virtue of a conviction or a civil decree.

Paragraph 12 was a separate paragraph which forbade Chrysler to "make any loan to or purchase the securities of" Commercial Credit or of any other credit company. It then provided:

> It is an express condition of this decree that notwithstanding the provisions of the preceding paragraph of this paragraph 12 and of any other provisions of this decree, *if an effective final order or decree not subject to further review shall not have been entered on or before January 1, 1941,* requiring General Motors Corporation permanently to divest itself of all ownership and control of General Motors Acceptance Corporation and of all interest therein, then and in the event, nothing in this decree shall preclude the manufacturer [Chrysler] from acquiring and retaining ownership of and/or control over or interest in any finance company, or from dealing with such finance company and with the dealers in the manner provided in this decree or in any order or modification or suspension thereof entered pursuant to paragraph 12a . . . [emphasis added].

Thus a distinction is made between the various restraints embraced in paragraph 6 and the prohibited affiliation covered by paragraph 12. The former were to terminate on certain stated contingencies. But the prohibition as to affiliation with a credit company was to expire unless a like prohibition was made finally effective against General Motors on or before January 1, 1941.

Jurisdiction to carry out the decree or to modify it was retained by the District Court. Over protest of Chrysler, the prohibition against its affiliation with a credit company was twice extended for periods of one year respectively, notwithstanding that no similar prohibition had ever been decreed against General Motors, and in fact no civil proceedings were instituted against General Motors until October 4, 1940. The propriety of the District Court's order thus modifying the consent decree was sustained by the Supreme Court in an opinion by Mr. Justice BYRNES. He finds the purpose of the decree plainly revealed in its text and explains it as follows:

> . . . It was, as stated in the District Court's findings, "that the ultimate rights of the parties thereunder should be determined by the government's civil antitrust proceedings against General Motors and affiliated companies." The time limitation was inserted to protect Chrysler from being placed at a competitive disadvantage in the event that the government unduly delayed the initiation and prosecution of the General Motors injunctive proceedings. The District Court found "that the government has proceeded diligently and expeditiously in its suit to divorce General Motors Acceptance Corporation from General Motors Corporation." There is room for argument that this statement is markedly generous to the government, inasmuch as the civil suit against General Motors was not instituted until almost two years after the entry of the consent decree and only three months prior to the limiting date in paragraph 12. But the finding is supported by several circumstances: the extended course of the appeals in the criminal proceedings against General Motors, for which the government was not responsible; the obvious bearing of the results in that litigation upon the method of handling the civil litigation with General Motors; and the ruling of the District Court in Illinois in July, 1941 in the General Motors civil action indefinitely extending the time to answer despite the government's objection, presumably to await the final disposition of the criminal case. In view of these considerations the finding of the court below was not unreasonable and we do not think that the government lost its right to seek a modification of the decree.

The controlling consideration as to the reasonableness of the ruling of the District Court is said to be whether the extension of the ban against affiliation places Chrysler under a competitive disadvantage. Chrysler made no showing that it did. Discussing this, the opinion concludes:

> . . . The record therefore reveals that Chrysler terminated its affiliation with Commercial Credit in 1938 before the consent decree was entered and does not reveal that it has since asserted any desire or intention to affiliate with Commercial Credit or with any other finance company. Moreover, we cannot be blind to the fact that the complete cessation of the manufacture of new automobiles and light trucks has drastically minimized the significance of the competitive factor. Consequently there is no warrant for disturbing the finding of the court below "that further extension of the bar against affiliation will not impose a serious burden upon defendants." If Chrysler desires to affiliate with a finance company and feels that its inability to do so places it at a disadvantage with its competitors, it should make such a showing to the District Court. That court expressly declared that Chrysler was free at any time to propose a plan for affiliation and to demonstrate that such a plan is necessary to avoid unfairness.

Mr. Justice FRANKFURTER delivered a dissenting opinion in which Mr. Justice REED joined.

The dissent emphasizes that the burden should rest upon the Government to show cause for changing the time limit in the decree rather than upon Chrysler to show that it would be prejudiced if the prohibition be continued beyond the stipulated time. In this connection, Mr. Justice FRANKFURTER says:

> . . . The burden obviously rested upon the government to show good cause for disregarding an express provision in a carefully framed decree, and extending to twice its original duration the period of restraint against Chrysler. So to enlarge the burden of the decree without any such showing by the government is a one-sided restriction of Chrysler's freedom of action, at least of its right to prove that the restricted action is innocent. Instead of exacting such proof from the government, the District Court cast upon Chrysler the duty of showing that it would not be prejudiced if the fetters remained after the period fixed by the decree. He who seeks relief from equity has the burden of showing that he is entitled to it. It is unfair to cast upon Chrysler the burden of proving that it would not be harmed if the government got what it wanted. As a practical business matter, Chrysler is not standing on an abstract right to devise means of financing its sales simply because it is not ready today with arrangements for a financial corporation, and the war precludes them.

Such arrangements cannot be devised overnight. It may well take a year to get them under way.

Considering, on the one hand, the drastic economic disadvantage to which Chrysler is put in being subjected to the hazard of contempt proceedings if it takes any steps toward preparing for affiliation in the future, and, on the other hand, the failure of the government to explain the apparent lack of diligence in prosecuting the proceedings against General Motors and to show that the modification was necessary to achieve the purposes of the consent decree, I am bound to conclude that the order of the District Court, unexplained by any opinion, was not within the proper limits of its discretion.

Mr. Justice ROBERTS, Mr. Justice MURPHY and Mr. Justice JACKSON took no part in the decision.

The case was argued by Mr. Nicholas Kelley for the appellants, and by Mr. Albert Holmes Baldridge for the appellee.

Income Taxes—Basis of Computation—Gain and Loss—Reorganizations

A corporation and its wholly owned subsidiary, whose bonds were guaranteed by the parent company, were reorganized under Section 77B of the Bankruptcy Act. The assets of the old companies were conveyed to the new company through conveyances by the debtor companies, the bankruptcy trustee and the indenture trustee. New securities were issued upon the order of the reorganization managers acting as agents for security holders, and immediately upon the exchange all the issued shares of the new company belonged to the previous holders of bonds of the old subsidiary company. Under these circumstances, the transaction constitutes a reorganization within the meaning of Section 112(b)(5) of the Revenue Act of 1936.

Helvering v. Cement Investors, Inc., 86 Adv. Op. 1142; 62 Sup. Ct. Rep. 1125; U. S. Law Week, 4417. (Nos. 644, 645 and 646, decided June 1, 1942).

These cases involve the issue whether, under Section 112(b)(5) of the Revenue Act of 1936, there should be any gain to taxpayers recognized from the transactions involved.

The taxpayers owned first mortgage bonds of Colorado Industrial Co., a wholly owned subsidiary of the Colorado Fuel and Iron Co., the bonds being guaranteed as to principal and interest by the parent company. A default having occurred, both companies sought reorganization under Section 77B of the Bankruptcy Act. Under a plan of reorganization, the assets of the two old companies were transferred to a new corporation which was to assume the obligations of the bonds of the parent company and issue income bonds and common stock for the bonds of the subsidiary company. The stockholders of the old companies received no interest in the new company but were given warrants to purchase new shares.

The plan was consummated by having the debtor companies, the bankruptcy trustee and the trustee under the indenture convey the assets of the old companies to the new company. The new securities were issuable to or on the order of the reorganization managers who acted as agents for the security holders. The managers effected an exchange of securities about September 1, 1936, and immediately after the consummation of the plan all the issued shares of the new company belonged to the previous holders of the bonds of the old subsidiary company. No stock was issued by the new company to other parties prior to October, 1936, when 37 shares were issued on the exercise of warrants.

Each of the taxpayers here exchanged his subsidiary company bonds for income bonds and common stock of the new company, and in each case the fair market value of the new securities exceeded the basis of the old. The Commissioner ruled that the profit from the exchange was a taxable gain and determined deficiencies. The Board of Tax Appeals held for the taxpayers and the Circuit Court of Appeals affirmed.

On certiorari, the judgment was affirmed by the Supreme Court in an opinion by Mr. Justice DOUGLAS. The opinion states that it is clear that the transaction does not constitute a reorganization within the meaning of Section 112(g)(1)(B) and that it does not meet the requirements of Section 112(g)(1)(C). However, the transaction is found to be within the scope of Section 112(b)(5), which provides as follows:

> No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation, and immediately after the exchange such person or persons are in control of the corporation; but in the case of an exchange by two or more persons this paragraph shall apply only if the amount of the stock and securities received by each is substantially in proportion to his interest in the property prior to the exchange.

Control is defined to mean:

> the ownership of stock possessing at least 80 per centum of the total combined voting power of all classes of stock entitled to vote and at least 80 per centum of the total number of shares of all other classes of stock of the corporation.

In analysis of Section 112(b)(5), in relation to the present transaction, Mr. Justice DOUGLAS says:

> If it may be said that property was transferred by the bondholders to the new corporation, then the other requirements of § 112(b)(5) were satisfied. For the bondholders, as owners of all of the outstanding shares of the new corporation were in "control" of it "immediately after the exchange." And it has not been disputed that the stock and income bonds acquired by each bondholder were substantially in proportion to his interest in the assets of the debtor companies prior to the exchange. Petitioner, however, maintains that the only transfer within the meaning of § 112(b)(5) was effected by the debtor companies, the bankruptcy trustee, and the indenture trustee; and that the exchange of the bonds for the new securities was merely part of the mechanics for consummation of the plan and not an exchange by which "property" was transferred to the new corporation. Though we agreed with the latter proposition, it would not necessarily follow that the requirements of § 112(b)(5) were not met.
>
> In case of reorganizations of insolvent corporations the creditors have the right to exclude the stockholders entirely from the reorganization plan. When the stockholders are excluded and the creditors of the old company become the stockholders of the new, "it conforms to realities to date their equity ownership" from the time when the processes of the law were invoked "to enforce their rights of full priority". . . . Under that approach the ownership of the equity in these debtor companies effectively passed to these creditors at least when § 77B proceedings were

instituted. But however their interest in the property may be described, it clearly was an equitable claim in or to it. It was that equitable interest with which the plan dealt. The transfer of the properties of the debtor companies to the new corporation was made pursuant to that plan. The plan was approved by the requisite percentage of these creditors, as required by § 77B(e)(1) of the Bankruptcy Act. Thus it is fair to say that the property transferred was property in which the creditors had an equitable interest and that the transfer was made with their authority and on their behalf. Certainly "property" as used in § 112(b)(5) includes such an interest in property. And we see no reason to conclude that a beneficial owner of, or equitable claimant to, property is precluded from consummating an exchange which qualifies under § 112(b)(5) merely because the actual conveyance is made by his trustee or title holder.

The legislative history of the provision is cited in support of the conclusion reached.

These cases were argued by Mr. Samuel O. Clark, Jr., Assistant Attorney General, for the Government, by Mr. Stephen H. Hart for the taxpayer in No. 644, and by Mr. Richard M. Davis for the taxpayer in Nos. 645 and 646.

Income Taxes—Credit for Income Taxes Paid on Accumulated Profits of Subsidiary

Under Section 131(f) of the Revenue Act of 1936, a domestic corporation is entitled to a credit on its income taxes when it has received dividends from a foreign subsidiary corporation which has paid income taxes to a foreign government upon the income, a part of which has come to the domestic corporation in the form of dividends. The fraction of the foreign tax which is allowed as a credit is calculated by using the dividends received by the parent as the numerator and the subsidiary's accumulated profits as the denominator. The multiplicand to which this fraction is applied is the taxes paid upon or with respect to the profits of the subsidiary.

American Chicle Co. v. United States, 86 Adv. Op. 1106; 62 Sup. Ct. Rep. 1144; U. S. Law Week, 4440. (No. 913, decided June 1, 1942).

This case deals with the proper formula for arriving at the credit, under Section 131(f) of the Revenue Acts of 1936 and 1938, which is allowed to a domestic corporation as to income received from a foreign subsidiary. The section permits a domestic corporation to credit against its tax the amount of income, war-profits, and excess-profits taxes paid or accrued during the taxable year to any foreign country, with certain limitations.

Section 131(f) provides that a domestic corporation receiving dividends from a subsidiary "in any taxable year shall be deemed to have paid the same proportion of any income, war-profits, or excess-profits taxes paid" by the subsidiary to a foreign country, "upon or with respect to the accumulated profits" of the subsidiary "from which such dividends were paid, which the amount of such dividends bears to the amount of such accumulated profits." "Accumulated profits" of the subsidiary is defined as "the amount of its gains, profits, or income in excess of the income, war-profits, and excess-profits taxes imposed upon or with respect to such profits or income."

In supporting the Government's contentions as to the proper interpretation of the statute, Mr. Justice ROBERTS, affirming a judgment of the Court of Claims, says:

> The parties are in agreement as to the fraction to be used in calculating the proportion. The numerator is the dividends received by the parent. The denominator is the "accumulated profits" of the subsidiary. The dispute relates to the multiplicand to which the fraction is to be applied. The petitioner says it is the total foreign taxes paid by the subsidiary. The respondent says it is the taxes paid upon or with respect to the accumulated profits of the subsidiary; i.e., so much of the taxes as is properly attributed to the accumulated profits, or the same proportion of the total taxes which the accumulated profits bear to the total profits. The Court of Claims so held. Since several decisions have gone the other way, we granted certiorari.
>
> If the language of the Revenue Act is to be given effect, the Government's view seems correct. The statute does not purport to allow a credit for a stated proportion of the total foreign taxes paid or the foreign taxes paid "upon or with respect to" total foreign profits, but for taxes paid "upon or with respect to" the subsidiary's "accumulated profits," which, by definition, are its total taxable profits less taxes paid.
>
> If, as is admitted, the purpose is to avoid double taxation, the statute, as written, accomplishes that result. The parent receives dividends. Such dividends, not its subsidiary's profits, constitute its income to be returned for taxation. The subsidiary pays tax on, or in respect of, its entire profits; but, since the parent receives distributions out of what is left after payment of the foreign tax,—that is, out of what the statute calls "accumulated profits," it should receive a credit only for so much of the foreign tax paid as relates to or, as the Act says, is paid upon, or with respect to, the accumulated profits.
>
> Hence we think that, under the plain terms of the Act, the Commissioner and the court below were right in limiting the credit by the use as multiplicand of a proportion of the tax paid abroad appropriately reflecting the relation of accumulated profits to total profits of the subsidiary.

In conclusion, the opinion considers a contention of the taxpayer based upon legislative history and administrative interpretation to the contrary, but finds the contention to be insupportable.

The case was argued by Mr. Edwin N. Griswold for the Taxpayer, and by Mr. J. Louis Monarch for the Government.

State Statutes—New Jersey Municipal Finance Act

The New Jersey Municipal Finance Act adapts the principles of an equity receivership to the solution of the financial problems of insolvent municipalities. A plan of adjustment adopted under the Act binds dissenting creditors and precludes them from any action for enforcement of their claims, except to enforce rights given under an adopted plan of adjustment. The statute is sustained against charges of unconstitutionality based upon contentions that it constitutes forbidden municipal bankruptcy legislation and operates to impair the obligation of a contract.

Faitoute Iron & Steel Co. v. Asbury Park, 86 Adv. Op. 1108; 62 Sup. Ct. Rep. 1129; U. S. Law Week, 4427. (No. 896, decided June 1, 1942).

The validity of the New Jersey Municipal Finance Act was challenged in this case as in violation of the contract clause of the Federal Constitution. The legislation, adopted in 1931, and supplemented in 1933,

adapts the principles of an equity receivership to the solution of the problem of insolvent municipalities. Under it, creditors may petition the state supreme court for approval of a plan of adjustment or composition of claims. If the plan is approved by 85% in amount of the creditors and by the municipality and the Commission, it may be adopted if the Court determines (1) that the debtor is unable to pay its claims in full, perform its public functions and preserve the value of property subject to taxation, (2) that the adjustment is substantially measured by the debtor's capacity to pay, (3) that it is in the interest of all affected creditors, and (4) that it is not detrimental to other creditors. No plan may reduce the principal amount of any outstanding obligation. Provision is made for hearing and the plan, conforming to the Act, binds all dissenting creditors and precludes them from bringing any action of any kind for the enforcement of their claims, except with the Court's permission and then "only to recover and enforce the rights given . . . by the adjustment or composition."

Under the provisions of this legislation, the City of Asbury Park was placed under the control of the Municipal Finance Commission, and a plan of adjustment was consummated. The plan called for the refunding of $10,750,000 of outstanding bonds to be exchanged for new bonds maturing at a later date and bearing a lower rate of interest than the old obligations. The appellants, non-assenting bondholders here, asserting the invalidity of the statute, brought suit for the face value of the old bonds and coupons. The state courts, however, sustained the legislation and on appeal to the Supreme Court, their action was affirmed in an opinion by Mr. Justice FRANKFURTER.

The legislation was challenged on two grounds: First, that it constitutes municipal bankruptcy legislation, which is a field occupied by Congress to the exclusion of state legislation; and second, that the bonds and coupons originally issued were contracts whose obligation was impaired by a denial of a right to full recovery thereon and by their transmutation into the securities authorized by the plan. Both contentions were rejected.

As to the first contention, it is pointed out that the power of Congress to legislate on the subject of municipal bankruptcy had not been finally established until 1938, and that the second Federal Municipal Bankruptcy Act was carefully drawn so as not to impinge on the sovereignty of the state in controlling its fiscal affairs.

As to the second and main contention, the opinion emphasizes that the remedy of mandamus compelling the levying of authorized taxes has been shown by experience to be little more than an empty right to litigate.

On the other hand, the challenged Act provides a more effective remedy from a practical standpoint. In this connection, the opinion enumerates the conditions under which a municipality may work out of its financial difficulties, and stresses that the legislation here fosters those conditions. Mr. Justice FRANKFURTER says:

> . . . Experience shows that three conditions are essential if the municipality is to be kept going as a political community and, at the same time, the utmost for the benefit of the creditors is to be realized: impartial, outside control over the finances of the city; concerted action by all the creditors to avoid destructive action by individuals; and rateable distribution. In short, what is needed is a temporary scheme of public receivership over a subdivision of the state. A policy of every man for himself is destructive of the potential resources upon which rests the taxing power which in actual fact constitutes the security for unsecured obligations outstanding against a city.
>
> * * *
>
> . . . The whole history of New Jersey legislation leaves no doubt that the state was bent on holding the municipalities to their obligations by utilizing the most widely approved means for making them effective. The intervention of the state in the fiscal affairs of its cities is plainly an exercise of its essential reserve power to protect the vital interests of its people by sustaining the public credit and maintaining local government. The payment of the creditors was the end to be obtained, but it could be maintained only by saving the resources of the municipality—the goose which lays its golden eggs, namely, the taxes which alone can meet the outstanding claims.
>
> The real constitutional question is whether the Contract Clause of the Constitution bars the only proven way for assuring payment of unsecured municipal obligations. For, in the light of history, and more particularly on the basis of the recommendations of its expert advisers, the New Jersey legislature was entitled to find that in order to keep its insolvent municipalities going, and at the same time fructify their languishing sources of revenue and thus avoid repudiation, fair and just arrangements by way of compositions, scrutinized and authorized by a court, might be necessary, and that to be efficacious such a composition must bind all, after 85 per cent of the creditors assent, in order to prevent unreasonable minority obstruction. As the court below pointed out, in view of the slump of the credit of the City of Asbury Park before the adoption of the plan now assailed, appellants' bonds had little value; the new bonds issued under the plan, however, are not in default and there is a very substantial market for them. The refunding scheme, as part of a comprehensive plan for salvaging Asbury Park, both governmentally and financially, was so successful that the refunding bonds were selling at around 69 at the time of refunding, while at about the time the present suit was brought commanded a market at better than 90.

In conclusion, the opinion alludes to the obscure dividing line between rights and remedies, and finds no ground for classifying the legislation in question as an impairment of a contractual obligation in the constitutional sense.

Mr. Justice REED concurred in the result.

The case was argued by Mr. Arthur T. Vanderbilt for the creditors, and by Mr. Ward Kremer for the city.

SUMMARIES

Federal Courts—Jurisdiction Over Suits Arising Under Laws Regulating Commerce

Peyton v. Railway Express Agency, Inc., 86 Adv. Op. 1048; 62 Sup. Ct. Rep. 1171; U. S. Law Week, 4410. (No. 903, decided May 25, 1942.)

Certiorari to review a judgment dismissing the plaintiff's complaint. The suit was instituted in a Federal District Court against the Express Agency to recover damages in the amount of $750,000 for negligent failure to deliver a shipment to the plaintiff. An express receipt attached to the complaint contained a $50 valuation. The Court dismissed on the ground that the amount in controversy was less than the $3,000 necessary to sustain jurisdiction under 28 U. S. C. Section 41(1). The Circuit Court affirmed. On certiorari, the Supreme Court, in a *per curiam* opinion, ruled that the suit comes within the jurisdiction conferred by 28 U. S. C. Section 41(8) conferring jurisdiction "Of all suits and proceedings arising under any law regulating commerce," irrespective of the amount involved.

The Express Agency confessed error and asserted that, under 49 U. S. C. Section 20(11), a suit brought against a single interstate carrier for its negligent non-delivery is one not merely to enforce a common law liability limited by an Act of Congress, but the very cause of action has its origin in and by the Act, and hence arises under it.

The case was argued by Mr. Robert L. Peyton, pro se, and by Messrs. Harry S. Marx and Charles C. Evans for the Express Agency.

Interstate Commerce Commission—Jurisdiction to Prohibit Discriminatory Practices

Northern Pacific Ry. Co. v. United States, 86 Adv. Op. 1050; 62 Sup. Ct. Rep. 1166; U. S. Law Week, 4411. (No. 927, decided May 25, 1942.)

Appeal to review a decree of the District Court sitting in Minnesota which dismissed a suit to set aside an order of the Interstate Commerce Commission, which required the railroads involved to cease and desist from maintaining certain rules and practices for the absorption of charges, found to be unduly discriminatory and offensive to the Interstate Commerce Act, 49 U. S. C. Section 1(6), 3 (1), 15 (1).

Certain grain interests complained of practices of the railroads at certain markets with respect to the absorption of connecting-line switching charges on noncompetitive or local shipments. After hearings, the Commission found that, at the markets in question, the railroads generally absorbed switching charges on competitive traffic but not on noncompetitive or local traffic, but at all other markets in central-western territory the railroads absorbed the switching charges on both competitive and noncompetitive shipments. The Commission condemned the practice of absorbing the charges on competitive traffic, and ordered the carriers to cease and desist from it.

The railroads did not challenge the validity of the Commission's findings or assert failure to comply with procedural safeguards, but attacked the order solely on the ground that the Commission exceeded its constitutional and statutory powers.

The Supreme Court, in a *per curiam* opinion, rejected the contention of the carriers, under the above cited provisions of the Interstate Commerce Act, and affirmed the decree dismissing the suit to set aside the order.

The case was argued by Mr. J. P. Plunkett for the appellants, and by Mr. Smith R. Brittingham, Jr. for the appellees.

Taxation—California Motor Vehicle Fuel License—Inapplicable to Sales to Army Post Exchanges

Standard Oil Co. of California v. Johnson, 86 Adv. Op. 1063; 62 Sup. Ct. Rep. 1168; U. S. Law Week, 4433. (No. 1125, decided June 1, 1942.)

Appeal to determine the application of the California Motor Vehicle Fuel License Tax. The Act, by its terms in Section 10, is inapplicable to "any motor vehicle fuel sold to the government of the United States or any department thereof for official use of said government," in determining the license tax (measured by gallonage) on the privilege of distributing motor vehicle fuel.

The distributor sold gasoline to United States Army Post Exchanges in California. The state levied a tax which the distributor paid under protest. The distributor then sued in a state court to recover the tax paid, on two grounds: (1) that sales to Exchanges were exempt by the terms of Section 10; and (2) if construed and applied to require payment of the tax on sales to the Army Post Exchanges, the Act would burden federal instrumentalities in violation of the Federal Constitution. The state courts held against the distributor on both grounds.

On appeal, the judgment was reversed by the Supreme Court in an opinion by Mr. Justice BLACK. The opinion reviews the status of Army Post Exchanges and concludes that as a matter of federal law they are, as now operated, arms of the government deemed by it essential in the performance of governmental functions. Consequently, the conclusion of the Court is that, by the terms of Section 10, the Act does not apply with respect to sales of motor vehicle fuel to Army Post Exchanges. In this view, it became unnecessary to pass on the constitutional question.

The case was argued by Mr. Francis Kirkham for the appellant, and by Mr. Adrian A. Kragen for the appellee.

TENTATIVE PROGRAM

65th ANNUAL MEETING OF THE

AMERICAN BAR ASSOCIATION

August 24 to August 27, 1942

THE ASSEMBLY

Monday, August 24, 1942. 10:00 A.M.

Address of Welcome

Response by Honorable Francis Biddle, The Attorney General of the United States

Response by Honorable L. S. St. Laurent, K.C., LLD., The Minister of Justice of Canada

Annual Address of the President of the Association

Offering of Resolutions

Announcement of vacancies in offices of State Delegates and Assembly Delegates

Nomination and Election of Assembly Delegates to fill vacancies

Nomination of four Assembly Delegates for two-year term ending with adjournment of 1944 Annual Meeting

THE HOUSE OF DELEGATES

Monday, August 24, 1942. 2:00 P.M.

Roll Call

Report of Committee on Credentials and Admissions

Approval of the Record

Statement of the Chairman of the House of Delegates

Report of the Treasurer

Report of the Budget Committee

Report of the Board of Governors

Election of members of the Board of Governors

Offering of Resolutions for Reference to the Committee on Draft

Reports of Committees:

(Calendar to be arranged by Committee on Rules and Calendar.)

THE ASSEMBLY

Monday, August 24, 1942. 8:30 P.M.

(Joint Session of American and Canadian Bar Associations)

Addresses by—

Representative of the Canadian Bar Association. (To be announced later.)

Sir Walter Monckton, K.C., K.C.V.O., Representative of the English Bar

10:00 P.M.

President's Reception

THE ASSEMBLY

Wednesday, August 26, 1942. 9:30 A.M.

Election of Assembly Delegates

Presentation of Award of Merit to a State and Local Bar Association

Presentation of Prize Award for 1942 Ross Bequest Essay

First Annual Meeting of The American Bar Association Endowment

Statement of work of American Law Institute

Open Forum—Report of Resolutions Committee

Address by—

Speaker to be announced later

THE HOUSE OF DELEGATES

Wednesday, August 26, 1942. 2:00 P.M.

(Calendar to be arranged by Committee on Rules and Calendar)

Wednesday, August 26, 1942. 7:30 P.M.

ANNUAL DINNER

(In which members of the Canadian Bar Association will join)

Presentation of the American Bar Association Medal

Speakers to be announced later

THE HOUSE OF DELEGATES

Thursday, August 27, 1942. 9:30 A.M.

(Calendar to be arranged by the Committee on Rules and Calendar.)

Statement of certification of nominations for officers

Election of officers

Adjournment

(Following Immediately)

THE ASSEMBLY

Report by Chairman of the House of Delegates of the action upon resolutions previously adopted by the Assembly

Action by the Assembly upon any resolutions previously adopted by the Assembly but disapproved or modified by the House

Unfinished Business

New Business

Presentation of new officers and members of the Board of Governors

Remarks by Incoming President

Adjournment

PROPOSED AMENDMENTS

To the Constitution of the American Bar Association

To Be Presented and Acted Upon at Its

Sixty-fifth Annual Meeting at Detroit, Michigan,

August 24 to 27, 1942

To the Members of the
American Bar Association
and of the House of Delegates:

I

NOTICE is hereby given that Howard L. Barkdull of Cleveland, Ohio, George H. Bond of Syracuse, N. Y., Thomas B. Gay of Richmond, Va., George M. Morris of Washington, D. C., and Chauncey E. Wheeler of Providence, R. I., members of the Association and members of the Rules and Calendar Committee of the House of Delegates, have filed with the Secretary of the Association the following amendments to the Constitution of the Association:

1. Amend Article V, Section 3, of the Constitution, by inserting after line 31, the following:

> "Former Presidents of the American Bar Association who register in attendance at any annual meeting of the Association by 12 o'clock noon on the opening day thereof, the membership of such former Presidents becoming effective upon registration and continuing until the opening of the next annual meeting."

and by renumbering lines 32, 33 and 34, as they now appear to make them follow consecutively the lines of the foregoing paragraph.

2. Amend Article VIII, Section 1, of the Constitution, by adding the following paragraph:

> "If, not earlier than one hundred and fifty days and not later than one hundred days before the date fixed for the opening of the annual meeting of the Association in any year, the Board of Governors shall recommend that the meeting of the State Delegates at which nominations of officers and members of the Board of Governors to be elected in that year are to be made, be not held in that year because the state of the Nation or the financial condition of the Association makes the holding of such meeting inadvisable, the Secretary shall prepare and mail to each State Delegate an appropriate ballot for voting upon the question whether said meeting shall be held, with the request that such ballot, duly marked, be mailed to the Secretary on a date to be fixed by him. Said date shall not be later than eighty days before the date fixed for the opening of said annual meeting of the Association. On the date fixed for the return of such ballots the Secretary shall count the same and shall certify the result to the Chairman of the House of Delegates. If a majority of the votes cast shall be in favor of not holding in that year said meeting at which nominations of officers and members of the Board of Governors to be elected in that year would have been made, then said meeting shall not be held and the State Delegates in that year, in lieu of making nominations at such meeting, shall make a nomination for each of the offices of the Association and for the members of the Board of Governors to be elected in that year, by mail ballot to be conducted in such manner and at such time as shall be determined by the President of the Association, the Chairman of the House of Delegates and the Secretary of the Association. The Secretary shall promptly announce and publish the nominations so made."

3. Pursuant to the resolution adopted by the House of Delegates at the last annual meeting of the Association held in Indianapolis, the members of the Rules and Calendar Committee named above will also submit for consideration by the House of Delegates at the annual meeting of the Association scheduled to be held at Detroit, Michigan, during the week commencing August 24, 1942, their conclusions and recommendations with respect to certain other amendments to the Constitution of the Association relating to the method of nominating officers and members of the Board of Governors.

II

Notice is hereby given that L. Stanley Ford of Hackensack, N. J., and William B. Carssow of Austin, Texas, members of the Association, have filed with the Secretary of the Association the following amendment to the Constitution:

> Amend Article IX, Section 1, of the Constitution, by striking out the word "Organization" in line 11 of said Section 1, so that said line will read "Section of Bar Activities".

HARRY S. KNIGHT
Secretary

BOOK REVIEWS

Madam Chairman, Members and Guests, by Helen Hayes Peffer. 1942. New York: Macmillan. Pp. 121.—Any woman or the husband of any woman who has been active in any of the important women's organizations of the day, will chuckle reminiscently and appreciatively as she or he reads this sympathetic and humorous description of the American club woman. I could almost imagine that the author was a fellow member of the organization in which I have served for so many years. Her description of the food served at club luncheons and the haughty attitude of the headwaiters reminded me of the ubiquitous creamed chicken and peas served by the same kind of waiters at similar luncheons in Chicago. Her chapter on awkward moments for club presidents made me think of the time that I introduced a very disgruntled Japanese editor who turned out to be a Japanese spy and who was very much disconcerted by the questions of the audience.

Three-fourths of the book is devoted to a humorous description of the petty foibles of club women, with a few words for those of club men. The last few pages however give an appreciative and critical appraisal of the accomplishments of women's clubs, closing with the statement that nowhere else is there so much unselfish and arduous work done for the general good of the community with so little thought of personal recognition or remuneration.

You Can Make a Speech, by William Doll. 1941. New York: Ronald Press. Pp. 250.—This is an interesting text-book on effective public speaking, written by a lawyer of long experience in teaching it, and in putting it into active practice.

The main theme of the book is that good speakers are made and not born. Emphasis is laid on the need of intensive preparation, not only in the assembling of the material for a speech, but for its actual delivery. Analysis is made of several speeches considered by the author to be outstanding examples of the points brought out in the book.

Although the book is written chiefly for the inexperienced, many of the examples given will call the attention of experienced speakers to faults of their own of which they are entirely unconscious. Such things as repetition, trite expressions, faulty enunciation or pronunciation and personal mannerisms are discussed humorously and critically. Many of the points may seem merely a repetition of the obvious. However, because the obvious is so often overlooked, this book should be of real interest to all speakers, actual or prospective.

L. T. S.

Chicago

Proceedings of the Fifty-First Annual Meeting of The Virginia State Bar Association. 1941. Richmond: Richmond Press, Inc. Pp. 408. *The Dallas Bar Speaks,* Vol. VI. 1941. Dallas: Wilkinson Printing Co. Pp. xvi, 374. The first of these volumes presents the traditional annual report of an active state bar association, complete with the transcript of proceedings and addresses at its annual meeting, reports of committees, and other memorabilia worthy of preservation in the records of the association. Of particular interest, however, is the appendix reporting the proceedings of dedication of the Supreme Court of Appeals building, at Richmond, with illustrations of the buildings in which the court has been housed supplementing the valuable historical material contained in the dedicatory addresses. In the second volume, the Dallas Bar Association adds another notable series to its collection of addresses at the weekly Legal Clinics that have become a permanent feature of the program of that organization.

Index to State Bar Association Reports and Proceedings, edited by Dennis A. Dooley. 1942. New York: Baker, Voorhis & Co., Inc. Pp. xii, 640. One of the most neglected fields of legal literature has been that of the American and state bar association annual reports of proceedings. In these thousands of books is to be found a wealth of material on the history of the bench and bar, the trends of law and government, and the contributions that the bar has made to the development of American jurisprudence. Through the efforts of the American Association of Law Libraries, this index now makes possible the full and easy use of these materials down to and including the volumes published in 1939. Although it is selective rather than definitive, the index includes references to all papers and speeches, necrologies, and such special committee reports as are distinctive in their contributions to legal literature. In addition to the state bar association reports, those of the American Bar Association, the Association of the Bar of the City of New York, Canadian Bar Association, and the New York County Lawyers' Association are likewise indexed.

The work evidences care and competence extending beyond mere cataloguing of titles to consideration of the subject matter of the articles indexed. It is well cross-referenced with appropriate subject groupings wherever possible. The net result is a reference guide that rounds out the coverage of *The Index to Legal Periodicals,* in which current bar association periodicals are now indexed. Since very few state bar associations have even attempted to compile complete indexes to their annual reports, this volume fills a need of long standing among bar association executives as well as students of the law and organized bar activities. The American Association of Law Libraries is to be congratulated on having carried this project to such happy con-

clusion; Dr. Dooley, who is State Librarian of Massachusetts, is to be commended for the excellent manner in which he has completed his difficult editorial assignment.

CHARLES B. STEPHENS.

Springfield, Illinois

Social Control Through Law, by Roscoe Pound. 1942. Yale University Press. 138 pages. This small but rich and highly suggestive volume is based on a series of lectures delivered by the distinguished author on the Mahlon Powell Foundation at the University of Indiana. Its central propositions are familiar to the educated lawyers of the country, who owe much to the dean of the Harvard Law School, since he has for decades written and lectured on the philosophical, historical and sociological aspects of jurisprudence. However, Dean Pound never restates his views without throwing new light on the problems confronting lawyers, teachers of law, judges and lawmakers. The present volume is a valuable addition to the library of these groups as well as of the intelligent lay public.

In these days of ruthless dictators, worshippers of brute force and enemies of law and morality, it is particularly desirable to appeal to first principles and to ask fundamental questions concerning law and government. Is there truth in the assertion of the Marxists that the ruling class, or group, legislates in its own interest solely, and that the government is merely the executive committee of that class or clique? If not, what influences shape and determine law, and what makes it progressive?

Dean Pound defines law as the principal means of social control. He is fully aware of the threats behind law, but he rejects, for good reasons clearly set forth, the notion that only the fear of penalties—"sanctions"—accounts for obedience to law. Religion, conscience, prevailing moral sentiments govern the behavior of the great majority, and this means that the law must satisfy the sense of justice and right.

The unsolved problems of law are frankly recognized, and recent changes as well as impending ones, attributable to the democratic and humanitarian spirit of the age, are reviewed with remarkable breadth, vision and ability. The striking conclusion is reached that the path of the juristic thought of tomorrow appears to be "the path toward an ideal of cooperation rather than one of competitive self-assertion." *Laissez faire* is discredited and dead, but regimentation and rigid collectivism are by no means inevitable. Liberty and individualism may and must survive in the new order, and the law will play an important part in preserving these values. Lawyers, however, will have to be philosophers and lovers of fair play and genuine civilization, not special pleaders or apologists for privilege and vested wrongs.

Bureaucracy Convicts Itself, by Alpheus Thomas Mason. 1941. New York: The Viking Press. Pp. 224. In this volume Professor Mason, the author of two books on the late Justice Brandeis, discusses "the Ballinger-Pinchot controversy—1910—and its meaning for today." In a way, he attempts to answer and refute Secretary Harold L. Ickes' "vindication" of Ballinger, an effort which surprised and puzzled many of the secretary's friends and admirers, including the present reviewer. Whether in this Professor Mason is wholly successful, is a question that may be left open. Suffice it to say that thoughtful lawyers will read the book with deep interest. The issues raised and debated in lively fashion are of the sort lawyers keenly enjoy.

Whether or not Ballinger was "an American Dreyfus", his case does illustrate the ways of bureaucrats with subordinates and superiors, and we certainly have more, not less, bureaucracy today. The question of conservation is of course still with us, as is that of administrative manipulation of statutes designed to protect national interests and prevent grand and petty larceny, Teapot Dome scandals and corrupt lobbying by politicians of influence at Washington.

It must be admitted, even by warm friends of Mr. Ickes, that some of his sweeping statements regarding the results of the investigation of the Ballinger affair by a congressional committee are shown by Professor Mason to be distinctly inexact and misleading. But the book under notice is valuable for the larger lessons drawn by the author with reference to democratic processes and the duties and responsibilities of men in high office, as well as the trying conflict of loyalties that arises when government employees of the humbler grades—often quite honest but timid and weak—suspect downright crookedness or, at least, suspicious and improper behavior on the part of trustees and guardians of public property.

The A B C of Criminology, by Anita M. Muhl. 1941. Melbourne, Australia: University of Melbourne Press. Pp. 237. Dr. Muhl of California, a visiting lecturer in psychiatry at the University of Melbourne, delivered thirteen lectures at that institution on many of the practical problems in the field of criminology and the more modern means being used to deal with them effectively. These lectures are now offered to the general public in a popular and interesting volume. No claim to originality is made in behalf of the contents of the book, but it conveys much useful knowledge and scientifically is up to date.

A general survey is followed by chapters on various crimes and on crime prevention, criminal investigation and methods of treating delinquency. A valuable feature of the book is the discussion of the reliability of testimony before and during trial. Cases are freely drawn upon to illustrate propositions and points of theory. Some of the cases are from past history and others are contemporary. To read about them is to be reminded of the adage that reality is often stranger

than fiction from the pen of ingenious and imaginative novelists and successful authors of detective stories.

Students of criminology and psychiatry in and out of colleges would find the book extremely interesting and informing.

VICTOR S. YARROS

Chicago

RECENT PUBLICATIONS

THE FUTURE OF GOVERNMENT IN THE UNITED STATES: ESSAYS IN HONOR OF CHARLES E. MERRIAM, edited by Leonard D. White. 1942. University of Chicago Press. Pp. VII, 274.

DEMOCRACY, EFFICIENCY, STABILITY: AN APPRAISAL OF AMERICAN GOVERNMENT, by Arthur C. Millspaugh. 1942. Washington, D. C.: The Brookings Institution. Pp. X, 522.

CONDITIONS OF PEACE, by Edward Hallett Carr. 1942. New York: Macmillan. Pp. XXIV, 282.

PROBLEMS OF POST-WAR RECONSTRUCTION, edited by Henry P. Jordan; foreword by Stephen Duggan. 1942. Washington, D. C.: American Council on Public Affairs. Pp. XIX, 292.

PROJET OF A CRIMINAL CODE FOR THE STATE OF LOUISIANA. Reporters: Dale E. Bennett, Clarence J. Morrow, Leon Sarpy. 1942. Baton Rouge: Louisiana State Law Institute. Pp. XVI, 151.

THE CONFERENCE OF AMBASSADORS (PARIS 1920-1931), by Gerhard P. Pink; preface by Paul Mantoux. 1942. Geneva: Geneva Research Centre. Pp. 293.

CORPORATION AND MANUFACTURING ACCOUNTING, by H. A. Finney. 1942. New York: Prentice-Hall. Pp. VIII, 534.

EXAMINATIONS IN CONTRACT LAW COURSES, by Edward F. Potthoff. 1942. Urbana: University of Illinois. Pp. 100.

PRACTICE NOTES, FIRST SERIES, BEING CONCISE NOTES ON THE WAR DAMAGE ACT, 1941. (War Damage Commission.) 1942. London: H. M. Stationery Office. Pp. IV, 30.

A DISCOURSE UPON THE EXPOSITION & UNDERSTANDING OF STATUTES, with Sir Thomas Egerton's Additions, edited from manuscripts in the Huntington Library by Samuel E. Thorne. 1942. San Marino, Cal.: Huntington Library. Pp. VII, 194.

FEDERALISM AS A DEMOCRATIC PROCESS: essays by Roscoe Pound, Charles H. McIlwain and Roy F. Nichols, with commentaries by Francis W. Coker and Edward S. Corwin. 1942. New Brunswick, N. J.: Rutgers University Press. Pp. 90.

TAX SYSTEMS. Ninth Edition. Edited by The Tax Research Foundation. 1942. Chicago and New York: Commerce Clearing House, Inc. Pp. 390.

The National War Labor Board

(Continued from page 470)

tract results with the usual rights of legal redress in the parties in case of violation.[76]

Following the practice of the Taft-Walsh Board[77] and the National Defense Mediation Board,[78] the present Board has adopted the procedure of referring cases in which the parties refused to obey its orders to the President for the application of such sanctions as he determines to be necessary and appropriate under his powers. Up to the present time, however, there has only been one case in which a party to a dispute has defied a Board decision to a point requiring presidential action. This involved a dispute between the Toledo, Peoria and Western Railroad and certain of its employees, in which a strike was called with a consequent interruption in transportation. The Board ordered the parties to submit its dispute to arbitration under the terms of the Railway Labor Act.[79] The company refused. The Board then referred the matter to the President who publicly requested the company to comply with the order without success. The President thereupon directed the Office of Defense Transportation to take immediate possession of the properties of the company and operate them "pending such termination of the existing labor dispute as may be approved by the National War Labor Board."[80]

In seizing the properties of the Toledo, Peoria & Western Railroad Company to terminate a labor dispute which was threatening the war effort, President Roosevelt was following precedent. President Wilson, during the first world war, took possession and control of the telegraph and telephone systems of the United States when Western Union Telegraph Company refused to comply with the decision of the Taft-Walsh Board and "desist from its practice of dismissing workers for joining the union."[81] Wilson also ordered seizure of the Smith and Wesson Arms plants when the company refused to reinstate striking employees in accordance with the decision of the Taft-Walsh Board.[82] The properties of both companies were operated by the government for the duration of the war.

Moreover, President Roosevelt himself, as we have seen, established precedent for his action in the Toledo, Peoria case by commandeering three plants in 1941 where employers refused to comply with the recommendations of the National Defense Mediation Board. The first was in a dispute between employees of the North American Aviation Company, where the members refused to return to work after a strike had been called by a minority group.[83] The second involved the Federal Shipbuilding & Dry Dock Co. where there was a refusal by the company to incorporate a "maintenance of membership" clause in the employment contract with a resulting strike and stoppage of production.[84] The last case involved the Air Associates Company in their failure to bargain collectively and return strikers to their jobs.[85]

President Wilson took possession of the telegraph and telephone systems in pursuance of a joint resolution of Congress, approved July 16, 1918,[86] and seized the Smith and Wesson Arms plants under the provisions of Section 120 of the National Defense Act of 1916.[87] President Roosevelt on the other hand, in commandeering industrial plants heretofore mentioned, including the properties of the Toledo, Peoria & Western Railroad, did not purport to act pursuant to any specific statutory authority. His orders were based upon powers vested in him by virtue of "the constitution and laws of the United States and as President of the United States and as Commander-in-Chief of the Army and Navy."[88]

The nature and source of the powers of the President to commandeer industrial plants and properties in wartime, without specific statutory authority, is a subject beyond the scope of this article.[89] Moreover, in the present war emergency, the question of executive power would appear to be more a matter of academic interest than practical concern to parties to a labor dispute—for if we may judge the future by the past, military occupation faces the plant where work is interrupted by industrial strife and the company or union involved refuses to accept the settlement ordered by the Board.

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76. See Parker v. First Trust and Savings Bank, 266 F. 961 (1920) holding that where a carrier declined to submit a dispute on wages to the Taft-Walsh Board, that it was not bound by its award, even though its employees did so submit the controversy.

77. Bul. of U. S. Bur. of Labor Stat. no. 287, pp. 24, 25, *supra* note 7.

78. Jaffe-Rice Report p. 2, *supra* note 2.

79. For order of Board see NWLB release PM 2593, (Feb. 27, 1942).

80. See Ex. Or. 9108, 7 Fed. Reg. 1532, (1942).

81. *Supra* note 77.

82. *Supra* note 77.

83. Ex. Or. 8773, 6 Fed. Reg. 2777 (1941).

84. Ex. Or. 8868, 6 Fed. Reg. 4349 (1941).

85. Ex. Or. 8928, 6 Fed. Reg. 5559 (1941).

86. 40 Stat. 904; also see Western Union Telegraph Co. v. U. S., 66 Ct. of Cl. Rep. pp. 41-42.

87. 39 Stat. 213.

88. See Ex. Or's. cited in *supra* notes 80, 83, 84 and 85.

89. See 55 Harvard Law Review 506-534 (1942) for an elaborate review of the powers of the President to commandeer plants and property in wartime; See also C. A. Berdahl, War Powers of the President of the United States, University of Illinois, Studies in the Social Sciences, Vol. IX. (1920.)

JUNIOR BAR NOTES

By JAMES P. ECONOMOS

Secretary

AS we enter the second half of the first year of warfare, we are impressed with the importance and necessity of large public demonstrations reaffirming pledges of loyalty and allegiance to the cause of the United Nations. These affairs clearly reveal that the uncertainties of the days immediately following Pearl Harbor have been replaced with a grim determination to win as expeditiously as possible. The many contributions made by the legal profession in this morale-building activity are very valuable and will continue.

It is amid this patriotic atmosphere that plans are being made for the Ninth Annual Meeting of the Junior Bar Conference in Detroit, commencing August 23. Barring unforeseen events, this meeting will attract the largest attendance in the history of the Conference. There are many reasons for this increased interest, ranging from the central location of the convention city to the war-integrated program being formulated by the Association. The recent announcement that married men will not be called upon for service for at least six or eight more months will permit this large group within this section to continue their activity unabated and to attend the meeting.

National Chairman Philip H. Lewis, Topeka, has received a preliminary report from Earl F. Morris, Columbus, Ohio, Chairman of the Program Committee, indicating that all sessions will be streamlined. General business sessions will be held Sunday afternoon, August 23, and Tuesday morning, August 25. A special meeting of State Chairmen and Public Information Directors will be held on the first day, followed by a get-acquainted subscription luncheon. That same evening the Junior Bar Group will entertain the visitors with a reception.

The third annual meeting of delegates of state and local Junior Bar groups will commence with a luncheon on the second day. The session will close on Tuesday evening with the Annual Dinner Dance and the introduction of the new officers.

Chairman Lewis has requested all members to continue their efforts on behalf of the Conference until their successors have been appointed, even though their annual reports have been filed. He has received the necessary authority to appoint a Committee on Legal Assistance to the Armed Forces. Members of this Committee will be urged to solicit the aid of the existing state and local bar associations in this important work so it may continue uninterrupted for the duration. Indications are that the senior bar will cheerfully cooperate.

Reports of the Membership Committee, headed by Julius Birge, Indianapolis, show an increase over the record of last year. Although quotas set last November have not been reached, it is considered likely that many states will do so by the close of the fiscal year. This record of achievement by the 48 state membership chairmen merits the sincere appreciation of every member of the Association.

Members of the Chicago, the Illinois, and American bar associations who are participating in the Public Information Program held a luncheon meeting in Chicago, on June 3. Chairman Lewis, National Director, Willett N. Gorham, Procedural Survey Director, Albert E. Jenner, Jr., Chairman of the Illinois State Bar Association Section on Younger Members Activities, Robert C. McClory, and Secretary Economos were introduced. David A. Bridewell and James H. Wheat, Co-State Directors of Public Information Program, reported a highly active campaign. Circuit Court Judge Harry M. Fisher delivered a stirring message on the present day events. The presiding officer was Alvah T. Martin, State Chairman and Chairman of the Chicago Bar Association Younger Members Committee. He is now serving in the Navy as a Lieutenant (S.G.).

The following day Chairman Lewis participated in a round table discussion on "The Lawyer in War" sponsored by the Section of Younger Members Activities during the annual meeting of the Illinois State Bar Association. New officers of this group for the coming year are Chairman Harper Andrews, Kewanee; Vice Chairman, A. A. Rubinson, Chicago; and Secretary Donald V. Dobbins, Champaign.

The Junior Section of the Iowa State Bar Association held its annual meeting in Des Moines on Saturday, June 6, Chairman Ray Nyemaster presiding. Chairman Lewis dwelt on the importance of keeping the organization functioning even though loss of personnel may require retrenchment in the number of activities. The meeting was well attended. New officers are Robert Buckmaster, Waterloo, Chairman; Paul F. Ahlers, Maquoketa, Vice Chairman; and Allen Denny, Des Moines, Secretary.

A Junior Bar Conference program was held in conjunction with the annual meeting of the Wisconsin State Bar Association at Madison, on June 26. Clarence P. Nett, State Chairman, was in charge of the meeting which was addressed by Chairman Lewis and Secretary Economos.

G. Pullen Jackson, Nashville, Secretary-Treasurer of the Junior Section of the Bar Association of Tennessee, proudly reports the activities of 154 members. Fifty-two are in the armed services. The remaining 102 contributed as follows: 77 engaged in Selective Service work; 46 acted as speakers, solicitors and canvassers for the U. S. O., Red Cross,

United China Relief and similar organizations; and 24 are either members of the State Militia or actively engaged in Civilian Defense activities. This is a real record of public service being unostentatiously performed in addition to carrying on the normal bar association work.

The Junior Section of the Lawyers Association of Kansas City, Missouri, has received the necessary approval for affiliation with the Junior Bar Conference. Jerry Duggan is Chairman of this energetic group.

Turner T. Smith has been elected Chairman of the Junior Section of the District of Columbia Bar Association. He is active in the Conference and is presently a member of the Committee on Restatement of Law. John H. Pratt, present State Chairman, is the retiring leader of this organization.

William R. Knapp has taken over the duties of Chairman of the Radio Committee, Barristers Club of San Francisco. This club is continuing the fine radio series and recently presented three sessions on "Courts Martial." Eugene Raggett has ably served as Chairman of this Committee for the past year. He is now in military service.

The Younger Lawyers' Conference of the Kentucky State Bar Association is the new title of the Junior Bar Section. Its officers are Ridley M. Sandidge, Owensboro, President; Donald Q. Taylor, Louisville, and John L. Davis, Lexington, Vice Presidents; and Watson Clay, Louisville, Secretary.

Last Retiring Chairman Lewis F. Powell, Jr., Richmond, Va., 1st Lieutenant Army Air Corps, is now in training at Miami Beach, Florida.

James D. Fellers, Oklahoma City, has been promoted to Captain and is now assigned as Intelligence Officer on the Staff of the Desert Air Force Commander during maneuvers in Indio, Calif.

August H. Nighswander, Laconia, N. H., has been appointed to the Committee on Restatement of Law to replace Harry E. Green, Cleveland, who is in government service; Dana M. Swan, Providence, R. I., has been appointed State Director in place of Alfred Joslin, who is on active duty with the Navy. Julian B. Fite, Muskogee, Okla., member of the Committee on Relations with Law Students, has been called to active duty in the Army. Donald Nofri, Chicago, Illinois State Membership Chairman, and J. Leland Rickard, Deposit, N. Y., New York State Membership Chairman, Richard Shuman, Boston, Procedural Reform Survey Director, have been inducted into the Army. Curtis Heath, New York, Committee on Relations with Law Students, and Joseph Werner, Madison, Wis., Membership Chairman, have gone to Washington, D. C. for legal staff work.

NOMINATIONS FOR EXECUTIVE COUNCIL

Attention to Members of Junior Bar Conference Residing in the Second, Seventh, Eighth, Ninth, and Tenth Federal Judicial Circuits and in the District of Columbia:

Pursuant to Section 4B of Article IV of the By-Laws, you are hereby notified that the members of the Junior Bar Conference residing in the Second, Seventh, Eighth, Ninth and Tenth Federal Judicial Circuits and in the District of Columbia (hereinafter referred to as Council Districts) may nominate candidates for the office of member of the Council from each of said Council Districts by written petition specifying the office for which nominated and containing the names of at least twenty endorsers, all of whom are residents of the respective judicial circuits. The petition can state briefly a biographical sketch of the background and qualifications of the candidate. It shall be submitted to the Chairman, Philip H. Lewis, New England Building, Topeka, Kansas, not later than August 8, 1942. At the first session of the annual meeting, the Chairman of the Conference shall deliver to the Chairman of the Nominating Committee all petitions submitted pursuant to these provisions.

The Nominating Committee shall consider the candidates proposed by each of said petitions, as well as receive names of other candidates and report its council nominees at the same time and place, and in the same manner that it reports the nominations for the officers of the Conference. Other nominations for the Council may be made from the floor following a report of the Nominating Committee. The election of Council members shall take place at the same time and place, and in the same manner as the election of officers.

TERM OF OFFICE: The term of office of the Council members elected at the Detroit Annual Meeting shall begin with the adjournment of the annual meeting at which elected and end with the adjournment of the second succeeding annual meeting next following the election, and until their respective successors shall be elected and qualify, except that the term of office of the Council member elected from the Second, Seventh, Ninth Federal Judicial Circuits and from the District of Columbia shall terminate with the adjournment of the annual meeting next following election, and until their respective successors shall be elected and qualify.

ELIGIBILITY: The person nominated shall be a resident of the Circuit for which he is nominated and provided that during his term of office, he shall not become ineligible for membership in the Conference. The membership of a member of the Conference shall terminate at the conclusion of the calendar year in which the member attains the age of thirty-six years, or upon his ceasing, prior to that time, to be a member of the American Bar Association. No person shall be eligible for election as a member of the Executive Council if he is a member of the Council and has been such member for a period of three years or more.

JAMES P. ECONOMOS, Secretary
Junior Bar Conference of the
American Bar Association.

BAR ASSOCIATION NEWS

ALFRED B. CARR, President
State Bar of Arizona

State Bar of Arizona

THE ninth annual meeting of the State Bar of Arizona was held in Tucson on April 24, 1942. The meeting was well attended. The morning session was taken up with routine business and an address by Mr. Hugo H. Harris of Los Angeles, his subject being "The Lawyer Anticipates the Fifth Column." A luncheon was tenderd by the Pima County Bar Association to the visiting members of the state bar at which an extremely witty address was delivered by Judge LeRoy Dawson of the Municipal Court of Los Angeles, his subject being "The Home Front or I Went Last Time."

The principal subject interesting the state bar at this time is Judicial Selection and Tenure. The afternoon meeting was largely devoted to this subject and the meeting was addressed by John Perry Wood of Los Angeles, chairman of the Committee on Judicial Selection and Tenure of the American Bar Association. His address was a very able analysis of the evils of the present system of popular election of judges and a presentation of the advantages of the system of selection of judges now prevailing in Missouri. A committee on this subject had been appointed by the president of the state bar last year and was continued for the purpose of conferring with the various civic bodies, service clubs, labor, agricultural, mining, livestock, educational bodies and groups with the idea in view of obtaining the assistance of these groups in securing a constitutional amendment for a better method of judicial selection and tenure. A plan for judicial retirement and pension was also approved by the meeting and referred to the same committee. A banquet was held in the evening which was addressed by Judge Stone of the Supreme Court of Illinois. The banquet was followed by a dance.

The officers for the ensuing twelve months are: Alfred B. Carr of Prescott, President; Orrin C. Compton of Flagstaff and Cullen A. Little of Globe, Vice Presidents; Henry H. Miller of Phoenix, Treasurer; and James E. Nelson of Phoenix, Secretary.

Illinois State Bar Association

PRESENTING a streamlined, down-to-business program emphasizing the part that lawyers are playing in winning the war and preparing for the peace to follow, the Illinois State Bar Association centered its sixty-sixth annual meeting, in Chicago, June 3 and 4, on the theme: "The Lawyer in War Time." A prominent and well-attended feature of the all-out war program was the three-state Lawyers War Rally in which state and local bar associations of Illinois, Wisconsin, and Indiana took part. President Benjamin Wham, Chicago, presided.

Among the outstanding speakers to appear before the convention were Mr. Justice James F. Byrnes, of the Supreme Court of the United States; Thurman W. Arnold, special assistant to the Attorney General of the United States; Maurice E. Bathurst, legal advisor to the British Information Service; Dean Mason Ladd, of the State University of Iowa law school; Philip H. Lewis, chairman of the Junior Bar Conference of the American Bar Association; Ralph M. Hoyt, of the American Bar Association Committee on Administrative Law; and Judge John J. Parker, of the American Bar Association's Committee on Improving the Administration of Justice.

Sections of the Association met during the morning of the opening day, June 3, with the Section on Probate and Trust Law presenting Attorney General of Illinois, George F. Barrett, Chicago, and members of his staff in one of the popular "How" demonstrations of practice in Illinois inheritance and federal estate tax matters.

The annual address by the President, Benjamin Wham, of Chicago, featured the program of the business session held that afternoon. After reviewing the services of Illinois lawyers in the war effort, President

CLARENCE W. DIVER, President
Illinois State Bar Association

Wham outlined the work of the bar in improving the administration of justice and the problems to be faced in winning the peace. The traditional ceremonies conferring the title of Senior Counsellor on members of the Association admitted to practice for fifty years or more concluded the afternoon program.

The Lawyers War Rally, on the evening of June 3, proved to be one of the most colorful and dramatic programs of the year, with military, naval and other detachments posting the national colors to open the program, and a brief dramatization of "The Spirit of Freedom," presented by members of the Chicago Bar Association. George I. Haight, of the American Bar Association's Committee on Bill of Rights, served as narrator for the pageant, then spoke on the duty of lawyers to preserve the essential freedoms. The address by Assistant Attorney General Arnold concluded the program.

The second day began with the traditional breakfast sponsored by the Section on Legal History and Biography, at which James F. Oates, chief of the contract service, Chicago Ordnance District, spoke on the work of lawyers in his important branch of government service. Dean Ladd and Erwin W. Roemer, of the Chicago bar, presented a symposium on the proposed Code of Evidence, with Mr. Bathurst discussing the effects of the war on law and procedure in England, to conclude the morning session of the general convention program.

Two interesting discussions featured the afternoon program on June 4. In the first, Dean Leon Green, of the Northwestern University law school, Judge Harry M. Fisher, of the Circuit Court of Cook County, and Mr. Hoyt, presented a panel discussion of the general relationship between the courts and administrative agencies.

Mr. Justice Byrnes was the principal speaker on the program for the annual dinner, held on the evening of June 4. As a mark of special honor to the speaker, the judges of the Seventh Circuit Court of Appeals and the United States district courts in the Seventh Circuit, were guests of the occasion. Judge Evan A. Evans, of the Seventh Circuit Court of Appeals, President Lloyd D. Heth, of the Chicago Bar Association, and Mayor Edward J. Kelly, of the City of Chicago, also spoke briefly on this program.

Officers of the Illinois State Bar Association for the year 1942-1943 elected and inducted at this time include: Clarence W. Diver, Waukegan, president; Warren B. Buckley, Chicago, first vice-president; Henry C. Warner, Dixon, second vice-president; Tappan Gregory, Chicago, third vice-president; R. Allan Stephens, Springfield, re-elected secretary; and Alvin C. Margrave, Springfield, re-elected treasurer.

CHARLES B. STEPHENS
Editor, Illinois Bar Journal

Bar Association of the State of Kansas

THE sixtieth annual meeting of the Bar Association of the State of Kansas was held at Wichita on May 22 and 23. The registration surpassed all estimates and the business sessions were well attended.

The morning of May 22nd and the afternoon of the 23rd were devoted to section meetings on practical problems covering property and title work, war-time legal problems, practice before boards and commissions and office and trial practice.

Friday noon the various law school alumni associations held their annual luncheons.

During the business meeting on Friday afternoon Senator James A. Reed of Kansas City, Missouri, delivered a stirring address and John F. Rhodes, President of the Missouri Bar Association, discussed the lawyer's work in connection with the war effort and made a report concerning the American Bar Association's Committee on War Work. The Kansas Association's committee

CHARLES D. WELCH, President
State Bar of Kansas

paid special tribute to 183 Kansas lawyers now in the service.

On Friday evening the Association's annual banquet was held. Among those making addresses were Hon. Homer Hoch, Justice of the Kansas Supreme Court, Hon. W. S. Culbertson, Charmian, Pa., and Hon. Robert T. Sloan, of the Kansas City (Missouri) Bar.

On Saturday morning the convention was high-lighted by a unanimous vote on a resolution favoring the adoption of an all-inclusive bar for Kansas. A committee of five is to be appointed to bring about the necessary statutory direction which will provide for an all-inclusive organization by Supreme Court Rule.

On Saturday evening the Wichita Bar presented a show, the third act of which was dedicated to the lawyer and his part, past and present, in the war effort.

Officers elected for the year 1942-1943 were: Charles D. Welch, Coffeyville, President; E. C. Flood, Hays, President-Elect; Everett E. Steerman, Emporia, Vice President; and Robert M. Clark, Topeka, re-elected Secretary-Treasurer. Douglas Hudson, Fort Scott, was elected state bar delegate to the American Bar Association for a two-year term.

ROBERT M. CLARK,
Secretary-Treasurer

North Carolina Bar Association

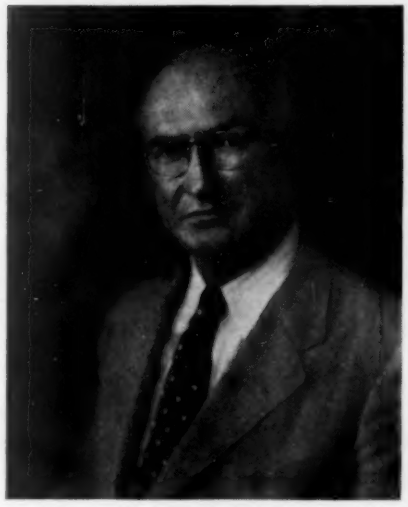
THE North Carolina Bar Association held its 44th Annual Convention at Pinehurst on May 15, 16 and 17, under the leadership of its President, Willis Smith of Raleigh.

The first session was devoted principally to committee reports followed by an Institute on Taxation. Among those appearing on the tax institute was F. T. Eddingfield of Washington, D. C., who discussed the technique of appeals in tax matters.

The second session was devoted to an address by the President, Willis Smith, on the subject "Citizenship and the Bill of Rights in War Time." Following this address was an address by Major Charles R. Jonas, who discussed the 1940 Soldiers' and Sailors' Civil Relief Act. This was followed by an illustrated lecture given by Harry C. Shriver of the Library of Congress.

The third session was devoted to committee reports and was featured by two addresses, the first given by Dr. Raphael Lemkin, Magister Juris, of Warsaw, Poland, who discussed "Law and Lawyers in the European Subjugated Countries," which was followed by an address delivered by John S. Bradway of Durham on "Legal Aid Service to Soldiers."

No meeting was held Saturday afternoon, which was devoted to a golf tournament and a trip for the ladies to the Orchid Garden of Judge Way. Late in the afternoon, the membership gathered at the Tomb of the late Walter Hines Page, United States Ambassador to Great Britain during the World War. This service was presided over by President Willis Smith, who introduced Sir Norman Birkett, Judge, High Court of Justice, King's Bench Division, London, England, who paid a tribute to the late Walter Hines Page and termed him "a citizen of the world." Sir Norman stated, "The idea that the British people and the people of the United States should be united in a bond that nothing



SAM COSTEN, President
Bar Association of Tennessee

can sever, perhaps is more important now than at any other previous period in history." Sir Norman's remarks were followed by J. Melville Broughton, Governor of North Carolina, who dwelt on the ties that bind Great Britain and the United States.

The highlight of the convention was the annual banquet which was addressed by Sir Norman Birkett.

The following officers were elected for the coming year: Linville K. Martin, of Winston-Salem, President; Allston Stubbs, of Durham, Secretary-Treasurer; and Richard E. Thigpen of Charlotte and Fred W. Bynum of Rockingham were elected to the executive committee.

Bar Association of Tennessee

THE 61st Annual Meeting of the Bar Association of Tennessee was held at Chattanooga on June 5 and 6. Hon. John C. Goins, President, of Chattanooga, presided at the meeting.

After the formalities of opening, the session was addressed by the Hon. Walter P. Armstrong, President of the American Bar Association and a former President of the Bar Association of Tennessee. The speaker at the noon luncheon was James S. Kemper of Chicago, Illinois, former President of the United States Chamber of Commerce, the title of his address being "America in War Economy." Hon. John W. Bricker, Governor of Ohio, made the principal address at the annual banquet held on the evening of June 5. And at the Saturday morning session an address was made by the Hon. Francis Biddle, Attorney General of the United States. The attendance and interest in the meeting were excellent, in spite of so many of the younger members being in the armed forces of the country.

A resolution was passed at the meeting creating a Women's Section for the women-lawyer members of the Association. The organization meeting for this Section will be held in September.

Officers elected for the Judicial Section were Judge Harry Adams, President, and Judge J. P. M. Hamner, Secretary-Treasurer, both of Memphis.

Officers for the Association elected for the ensuing year were: President: Sam Costen, Memphis; Vice Presidents: Ewell T. Weakley, Dyersburg, Albert W. Stockell, Nashville, J. Malcolm Shull, Elizabethton; Secretary-Treasurer: Thos. O. H. Smith, Nashville.

New members elected to the Central Council were: Richard N. Ivins, Chattanooga, J. Washington Moore, Nashville and E. W. Hale, Jr., Memphis.

Delegate to the American Bar Association: John J. Hooker, Nashville.

Fred W. Bynum of Rockingham, retiring President Willis Smith of Raleigh, Governor Melville Broughton (seated) and Sir Norman Birkett of London, England, laying wreath on tomb of the late U. S. Ambassador to Britain, Walter Hines Page.

ANNUAL MEETING
DETROIT, MICHIGAN

August 24-27, 1942

The Sixty-Fifth Annual Meeting of the American Bar Association will be held at Detroit, Michigan, August 24 to 27, 1942. Further information about the meeting will be given in the JOURNAL from time to time.

Hotel Accommodations

Official Headquarters—Statler Hotel.

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Fort Shelby (525 Lafayette)	2.75– 5.00	4.00– 7.00	4.90– 7.00	11.00– 16.00
Statler (Washington & Park)				

(Advance reservations have now exhausted all space at Headquarters Hotel.)

Explanation of Type of Rooms

A single room contains either a single or double bed to be occupied by *one person*. A double room contains a double bed to be occupied by *two persons*.

A twin-bed room contains two beds to be occupied by two persons. A twin-bed room will not be assigned for occupancy by one person.

A parlor suite consists of parlor and communicating bedroom containing double or twin beds. Additional bedrooms may be had in connection with the parlor.

To avoid unnecessary correspondence, members are requested to be specific in making requests for reservation, stating hotel, **first and second choice** of, number of rooms required and rate therefor, names of persons who will occupy the same, arrival date and, if possible, definite information as to whether such arrival will be in the morning or evening.

Requests for reservations should be addressed to the Reservation Department, 1140 N. Dearborn Street, Chicago, Illinois.

LETTERS FROM MEMBERS

To the Editor of the JOURNAL

John G. Palfrey, Esq., of Boston, Massachusetts, has recently authorized me to write the official biography of Mr. Justice Oliver Wendell Holmes. The ultimate success of my effort will depend largely on the assistance which I am able to secure from others, particularly, perhaps, from members of the bar. It is for that reason that I turn to the AMERICAN BAR ASSOCIATION JOURNAL, hoping that this communication may be noticed by some who can aid me.

My search is for authentic biographical information, for letters written by Justice Holmes, and for the small unrecorded details of his career. Lawyers, I am sure, will understand my eagerness for information concerning incidents of argument before the Court, no matter how trivial those incidents may on their face appear to be. This stage of my endeavor might be titled, in imitation of Dr. Holmes, "My Hunt after 'The Justice.'" All who can help me on my way will earn my warmest gratitude.

Very sincerely yours,
MARK DEWOLFE HOWE
Dean, School of Law
The University of Buffalo

To the Editor of the JOURNAL

May I add a little something to the note on Shakespeare's Legal Documents by Mr. John H. Wigmore in the February issue of your JOURNAL?

Yes, the authentic signatures have survived enemy action. Unhappily the same story cannot be told of two priceless buildings. The Middle Temple Hall and Gray's Inn Hall were the only remaining buildings in which plays of Shakespeare were performed during his lifetime. *Twelfth Night* was played in the former; the *Comedy of Errors* in the latter. It is not known whether he was acting on either occasion. Possibly in the former. Probably not in the latter.

Now, alas, both halls have suffered. Some fittings in Gray's Inn Hall have been saved; otherwise the walls alone remain. How far the Middle Temple Hall can be restored is, I understand, not yet ascertainable.

In the sumptuous memorial volume which was published by your Association after the visit to this country in 1924 appear photographs of both halls as they then were. The west end of Gray's Inn Hall with the Elizabethan screen only is shown. I am enclosing herewith a picture of the east end.

"Links between Shakespeare and the Law" by the late Sir Plunket Barton, with a foreword by your former Solicitor General, the late Hon. James Montgomery Beck, shows how many were such links. Some came to light through the author's original investigations. Whether the book is obtainable on your side of the ocean, I know not. It was published in London by Faber and Gwyer of 24, Russell Square. If, however, it would interest you I would, if I could, get a copy for you, or if I cannot, I would loan you my own presentation copy with great pleasure.

J. LEONARD CROUCH
5, Paper Buildings,
Temple,
London, E. C. 4

To the Editor of the JOURNAL

You have recently interested the Bar by publishing Mr. Seasongood's informative letter about the Holmes-Pollock correspondence. At about the same time the Harvard Law Review contained a review of those Letters by Professor Max Lerner. Especially when you take the two of these together, the result is so one-sided that I offer my contribution.

Sir Frederick Pollock was my friend during the forty and more years when he and I were connected by our service to the Selden Society. He did not suffer gladly even wisdom which he thought he had a right to condemn. But the Bar and people interested in great legal figures would do wisely to think of him in scenes like the following:

He had an animated conversation with the Director of the Gardner Museum in Boston over the attribution of a picture to Giorgione, and the Director thought that he was first-rate in that sphere. He gave the accolade to a young Lochinvar of the Year Books who had come out of our great West. There was no complaint there about his manners. Think of his keen enjoyment of the affectionate friendship of Ruth Draper, and of the meeting at which he and President Lowell of Harvard and Miss Draper rejoiced in reading the only unexpurgated copy in England of "Gentlemen Prefer Blondes." The

East end of Gray's Inn Hall

Prince of Wales portion had been expurgated from the English edition. Or listen to my son's account, coming from 1932 when the young man took his degree at Cambridge University. The tradition in Trinity College there was of young undergraduates sitting up all night entranced by the venerable Pollock's conversation and staying power. And my son went to "The Barretts of Wimpole Street" in a London theatre party to which the Pollocks, both then over eight-five, had invited a lady of over seventy-five to make the four. Pollock, as a theatrical critic, was also a first-class conversationalist that night.

I doubt the competence of any reviewer or critic in this country to call Pollock second-rate as Professor Lerner does. Pollock was conceded by real philosophers to be first-rate about Spinoza, both on the deeper side of apprehending philosophy and in the way of expounding Spinoza to the general public. To pass a verdict upon Pollock as inferior is to assume superior wisdom. To such matters as Spinoza and the Year Books I might add the legal considerations surrounding the abdication of Edward VIII, upon which Pollock's opinion was taken.

Those who would like to know what Pollock could do in the conversational line should read his "For My Grandson." Those who call him second-rate should be reminded of the parable.

RICHARD W. HALE

Boston, Mass.

Editorial Note:

In the May number of the JOURNAL, *page 375, we printed a letter from Colonel Halstead. Our reply, addressed to Colonel Halstead, was returned from the office of The Adjutant General with the following letter:*

American Bar Association Journal
1140 North Dearborn Street
Chicago, Illinois
Gentlemen:

It is with regret that I must return your letter addressed to Lieutenant Colonel E. T. Halstead, who was serving in the Philippine Islands at the time of final surrender and who is now being carried by the War Department as "missing in action."

Army Postal Service to the Philippine Islands has been temporarily discontinued.

Very truly yours,
J. A. ULIO
Major General
The Adjutant General

Washington, D. C.

Hon. Walter P. Armstrong,
President, American Bar Association,
Memphis, Tenn.

Dear Sir:

I am handing you a clipping from the American Bar Association Journal of March 1942.

When I made an application to our local board for two obsolete tires and tubes it was declined.

It seems to me that our Association ought to take this matter up and see if the legal profession cannot have a little recognition along with the clergymen, doctors and other professionals.

I have been a member of the Association for a great many years. Have not attended any of the meetings for a long time, but my age is a good alibi, for I will soon be 82 years of age.

Yours very truly,
GEO. E. GREENE

Hoosick Falls, N. Y.

Lawyers and Realtors Settle Controversey

(Continued from page 452)

and Mr. Clifford W. McKibbin, chairman of the Realtors Legal Rights Committee, all of the National Association of Real Estate Boards, an agreement in the form of a resolution was adopted.

The Board of Governors of our Association approved the resolution in principle on May 13, 1942 and the Board of Directors of the National Association of Real Estate Boards took similar action on May 22, 1942.

The National Conference will be organized as soon as possible and it is hoped that it will make as successful progress in this field as has been shown by the National Conference Group organized with the American Bankers Association Trust Division and other similar groups.

This agreement, or statement of principles, mentioned in an editorial in the June issue of the JOURNAL, follows:

WHEREAS, it is not the province of the realtor to engage in the practice of law, nor of the lawyer to engage in the real estate business, nor is it in the interest of the public that they should do so; and

WHEREAS, it is in the interest of the realtor, the lawyer and the public, that a joint conference committee should be formed to implement by a statement of principles the general purposes above indicated;

NOW, THEREFORE, BE IT RESOLVED by the undersigned that a National Conference of Realtors and Lawyers is hereby organized and does hereby formulate a statement of principles as follows:

ARTICLE I

(1) The realtor shall not practice law or give legal advice directly or indirectly; he shall not act as a public conveyancer, nor give advice or opinions as to the legal effect of legal instruments, nor give opinions concerning the validity of title to real estate, and he shall not prevent or discourage any party to a real estate

transaction from employing the services of a lawyer.

(2) The realtor shall not undertake to draw or prepare documents fixing and defining the legal rights of parties to a transaction. However, when acting as broker, a realtor may use an earnest money contract form for the protection of either party against unreasonable withdrawal from the transaction, provided that such earnest money contract form, as well as any other standard legal forms used by the broker in transacting such business, shall first have been approved and promulgated for such use, by the Bar Association and the Real Estate Board in the locality where the forms are to be used.

(3) The realtor should not seek to participate in the lawyer's fees, or in any way seek to influence the lawyer's compensation in real estate transactions in which the lawyer is consulted as legal counsel.

ARTICLE II

(1) The lawyer should not express any opinions concerning the business prudence of real estate transactions in which his services as legal counsel are used, or concerning which he may be consulted, unless such opinions are sought by his client.

(2) The lawyer should not seek to participate in the realtor's commissions or in any way seek to influence the realtor's compensation in transactions in which the lawyer is consulted as legal counsel, or otherwise.

(3) A lawyer who engages in business activities ordinarily undertaken by a realtor, such as selling, leasing, managing and appraising property for the account of others, should qualify under the Real Estate License Acts in states having them, except where the lawyer acts for himself as a principal or as a fiduciary.

ARTICLE III

(1) The National Conference of Realtors and Lawyers shall consist of five (5) realtors appointed by the President of the National Association of Real Estate Boards, and five (5) lawyers, members of the American Bar Association, to be designated by the Chairman of the Standing Committee On Unauthorized Practice of Law of the American Bar Association.

(2) The National Conference shall seek to have the two Associations:

(a) Engage in common effort to simplify laws and procedure governing real estate transactions and to reduce the cost thereof;

(b) Eliminate detrimental practices arising in connection with the taking of expert testimony of the valuation in litigations involving the value of real property;

(c) Maintain a constant exchange of information concerning any practices on the part of their members which may be detrimental to the public or to the members of either Association.

(3) The National Conference may consider any controversies referred to it between realtors and lawyers and shall seek to settle and dispose of same.

(4) The National Conference, in line with the principles herein stated, shall from time to time issue such further statements of principle as may be agreed upon which are deemed in the public interest and in the interests of realtors and lawyers.

(5) The National Conference, in the public interest and for the purpose of implementing and making effective the carrying out of the principles herein stated and which may hereafter be promulgated and the amicable and cooperative solution of disputes or misunderstandings in relation thereto, shall seek to be of assistance in an advisory capacity to state and local bar associations and real estate boards.

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Louis Goldstein,
Secretary,

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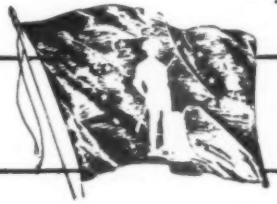

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